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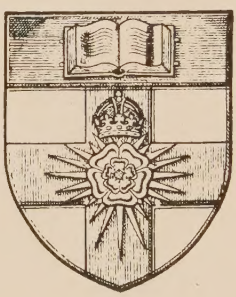

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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

HEPWORTH MANUFACTURING COMPANY, LIMITED *v.* RYOTT.

C. A. 1919

ASTBURY J.

[1919. H. 587.]

May 19, 20, 28.

Restraint of Trade—Contract of Employment—Validity—Film Actor—To act under Pseudonym—Pseudonym to be Employers' Property—Not to be used after leaving Employment—Actor's professional Reputation and Identity merged in Pseudonym.

C. A. 1919

Oct. 15, 16.

The plaintiffs, who were film producers, employed the defendant as a film actor. His contract of employment required him to act under a pseudonym, which should be the sole property of the plaintiffs. On the determination of the contract he was precluded from using the pseudonym for any purpose whatever and from film acting for new employers unless and until they agreed not to announce or advertise his performance under the pseudonym.

Owing partly to his own ability and partly to the plaintiffs' advertisements the defendant acquired a considerable reputation under the pseudonym in which his professional identity became so completely merged, that his market value without it would be diminished more than 50 per cent. until his identity and reputation were re-established de novo.

The defendant having entered the service of rival film producers under the pseudonym; the plaintiffs sued for an injunction:—

C. A.
1919
HEPWORTH MANUFACTURING COMPANY v. RYOTT.

Held, by Astbury J., that the contract was tyrannous, oppressive and unreasonable, and whether it was in restraint of trade or not the Court would not enforce it.

Mason v. *Provident Clothing and Supply Co.* [1913] A. C. 724; *Herbert Morris Ld.* v. *Saxelby* [1916] 1 A. C. 688; and *Horwood* v. *Millar's Timber and Trading Co.* [1917] 1 K. B. 305 applied.

Held, also, by Astbury J. and by the Court of Appeal, that in the circumstances the contract was in partial restraint of trade and not reasonably required for the protection of the employers, and for this reason would not be enforced.

Vernon v. *Hallam* (1886) 34 Ch. D. 748 distinguished.

Decision of Astbury J. affirmed.

WITNESS ACTION.

The plaintiffs were manufacturers or producers of kinematograph films. The method of conducting this business is described in the judgment.

On December 1, 1913, after a few months' preliminary trial they engaged the defendant as a film actor under a printed contract, which was renewed in June, 1914, by a similar contract in the same form and containing the same clauses as the contract below stated.

By this contract, dated October 29, 1915, the plaintiffs engaged the defendant as a film actor for twelve months from June 1, 1915, at 7*l.* a week.

This contract contained the following clauses:—

"3. If the [plaintiffs] advertise the [defendant] they will do so under the pseudonym of Stewart Rome, and the right to use such pseudonym or any other pseudonym hereinafter agreed upon in connection with photo-plays or otherwise, shall be the sole property of the [plaintiffs].

"4. Upon the determination of this agreement it is hereby declared and agreed as to any such pseudonym as follows:—

"(*a*) The [defendant] shall not use such pseudonym for any purpose whatever and (*b*) shall not dance act perform or otherwise pose for the purpose of being photographed by any person firm or corporation or agree so to do unless and until the said person firm or corporation have agreed in writing with him not to expose or advertise photographs of him under such pseudonym and further (*c*) shall not

dance act perform or otherwise appear in any theatrical dramatic or spectacular entertainment under such pseudonym and (*d*) shall not agree with any person firm or corporation to dance act perform or otherwise appear in any such theatrical dramatic or spectacular entertainment unless and until such person firm or corporation have agreed in writing with him not to announce or advertise his dance act performance or other appearance under such pseudonym.

"14. It is agreed that the [plaintiffs] shall have the option of re-engaging the [defendant] for a further period of one year at a salary of not more than 8*l.* per week or such smaller sum as may be agreed upon, and in other respects on the same terms and conditions as herein contained, and that they may exercise this option at any time before the termination of this agreement."

This contract expired on May 31, 1916, but the engagement was verbally renewed for another year at 10*l.* a week.

In January, 1917, the defendant was called up for national service. Long before this time he had acquired an enormous reputation under the pseudonym Stewart Rome, by which name alone he was known to the public.

This was partly due to his great ability and partly to the plaintiffs' advertisements.

On demobilisation, being unable to agree to terms of re-engagement with the plaintiffs, who offered him 10*l.* a week for a year with a further year at their option, the defendant, who objected to bind himself at this salary for so long a period, entered the employment of Broadwest Films, Ld., as Stewart Rome at 20*l.* a week.

On March 25, 1919, the plaintiffs, who had spent large sums of money in advertising the pseudonym in connection with their films, brought this action for an injunction.

The facts were substantially not in dispute, and the only question was whether the contract was enforceable.

The evidence showed that the defendant's market value, if shorn of his professional name, would be only 7*l.* a week until his identity was re-established, and that this would take some little time.

C. A. 1919

HEPWORTH MANUFACTURING COMPANY v. RYOTT.

The action came on for hearing before Astbury J. on May 19, 1919.

Micklem K.C., *Hon. Frank Russell K.C.* and *Dighton Pollock* for the plaintiffs. The defendant is bound by his contract not to use the pseudonym Stewart Rome. That contract is enforceable for two reasons.

First. It is not a contract in restraint of trade: *Vernon* v. *Hallam* (1); *Lotinga* v. "*The People*," *Ld.* (2) In the latter case the plaintiff, who had written for the defendants under the pseudonym Larry Lynx, failed in his action for wrongful dismissal, and was restrained on the counterclaim from using the name Larry Lynx to the prejudice of the defendants' proprietary right.

Secondly. If it is a contract in restraint of trade, the restrictions are reasonably necessary for our protection. The pseudonym is our property. True, we cannot use it for any other film actor for fear of deceiving the public, but we are entitled to prevent the defendant using it to our prejudice. Our present stock of films would be depreciated by that user, and if the defendant acted for an inferior company our reputation might suffer.

[ASTBURY J. Is not the defendant entitled to act as Wernham Ryott or A. B., "formerly Stewart Rome in the Hepworth Co." ?]

No. He is bound to tell his new employer who he was, and obtain the written agreement under clause 4. But he may not tell the public.

Patrick Hastings K.C. and *H. E. Wright* for the defendant. From 1894 onwards the Courts have drawn a wide distinction between restrictive covenants on the sale of a business and goodwill, and restrictive covenants between employer and employee: *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (3); *Mason* v. *Provident Clothing and Supply Co.* (4); *Herbert Morris Ld.* v. *Saxelby.* (5)

In the former case the name may form part of the goodwill

(1) 34 Ch. D. 748, 751.
(2) (1913) Times, November 13, p. 3*d*; November 14, p. 3*f*; November 15, p. 4*d*; November 17, p. 3*a*; November 25, p. 4*b*.
(3) [1894] A. C. 535, 566.
(4) [1913] A. C. 724, 731, 737.
(5) [1916] 1 A. C. 688, 701, 708, 713.

sold, and, ex necessitate rei, the vendor may validly contract not to use it, as in *Vernon* v. *Hallam*. (1)

But there is nothing of that sort as between employer and employee, and with the exception of the newspaper report of *Lotinga's Case* (2), where no arguments or reasons are given, there is no reported case in which a mere employee has been restrained from using his original or acquired name.

The present contract savours of slavery.

Having purposely merged the defendant's identity in the trade name with which they have clothed him, the plaintiffs now seek to prevent him from using that trade name except in their service. With the use of that name, now really his own, his open market value is 20*l*. a week. Shorn of it he is only worth 7*l*. The obvious result is that he is either perpetually tied to the plaintiffs at about 10*l*. a week or must begin life again at 7*l*. Such a contract is clearly unenforceable.

The so-called proprietary right that the plaintiffs claim in the pseudonym is a mere shadow. They admittedly cannot use it except as owners of their old films. They merely want to restrain the defendant from using it for new films. That is simply an attempt to prevent the competition of a former employee. That is not allowed: *Mason's Case* (3); *Saxelby's Case*. (4)

Even if the contract is not technically in restraint of trade it is unenforceable. The Court will not enforce a contract fettering a man's liberty of action: *Horwood* v. *Millar's Timber and Trading Co.* (5); unless it is for his benefit: *Denny's Trustee* v. *Denny*. (6)

Micklem K.C. in reply. There is nothing unfair in the contract.

We taught the defendant his business, and advertised our films under the pseudonym. Both parties contributed to the production of the films. We did the photographing and advertising; the defendant did the acting, for payment.

(1) 34 Ch. D. 748, 751.
(2) See note (2), ante, p. 4.
(3) [1913] A. C. 724.
(4) [1916] 1 A. C. 688, 700, 702, 704, 709, 710, 717.
(5) [1917] 1 K. B. 305.
(6) [1919] 1 K. B. 583, 588.

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Why should he not agree that the goodwill in the pseudonym attached to the joint product should belong to us ?

[ASTBURY J. That argument would equally apply if he had acted in his own name. Such a proposition would be quite untenable. But even if you are right, you only want protection during the life of your existing films. Your contract is far too wide.]

Why ? It merely causes a temporary reduction of the defendant's salary until he re-establishes his identity and reputation either under his own name or under any pseudonym not belonging to us. For the time being it prevents him carrying away the benefit of our advertisements, but he has had the benefit of our teaching and salary in return for which he has contracted to submit to this temporary inconvenience. Surely that is not a ground for refusing to enforce the contract.

Cur. adv. vult.

May 28. ASTBURY J. This is an action to restrain the defendant, Wernham Ryott, who is an actor, from using the stage name of "Stewart Rome" for any purpose whatever, and from acting or otherwise appearing thereunder. The issue between the parties is a novel one, and having regard to the astonishing growth of the kinematograph industry in recent years, it is of widespread interest and importance.

Each party respectively appeals to one of two different principles well established in our law, upon the enforcement of both of which much of our social structure depends. These are principles which, until reconciled by some rule of application, appear at first sight to be in conflict, and it is on the right appreciation of this method of reconciliation and to the proper deduction to be drawn from the facts of this case that the solution of this issue depends.

The plaintiffs are manufacturers or producers of kinematograph films, there being only eight or ten similar producers in this country of first-class reputation and importance. Their modus operandi is shortly as follows. They rely principally upon a stock company of actors and actresses in staging the plays which they photograph. The films

are hired out to "renters" for terms of years, who in their turn arrange for their being shown at theatres and places of entertainment throughout the country. In the case of a small minority of these films a re-issue after the renter's term has expired sometimes takes place, to the same or other renters.

The success of the producers depends upon many circumstances, such as the choice of the play, the training, skill and success of the performers, the advertisement of the plays and the star performers who have acted in them and the retention over periods of time of these popular stars in the stock company.

As between rival producers the popularity of their star performers is of first-rate importance. The greater their skill the greater becomes the success of films in which they are known to have acted, and the greater the advertisement of these favourites the wider becomes the demand for their plays. It follows from this that it is to the obvious interest of the producer, for his own purposes, to advertise the most important feature of his wares by photographs and other methods, and thus identify his films with popular favourites.

In December, 1913, the plaintiffs engaged the defendant who, except for a few months' preliminary trial with them, had no experience of kinematograph work, on a term contract. This engagement was renewed in June, 1914, and by a subsequent contract of October 29, 1915, which is the one sued upon in this action, he was re-engaged for twelve months from June 1, 1915, at a salary of 7*l.* per week. Under this contract the plaintiffs had an option to re-engage the defendant for a further period of twelve months, and this was done at a salary of 10*l.* per week.

In January, 1917, the defendant was called up for national service, and has not since been in the plaintiffs' employ.

By an ingenious device made use of by the plaintiffs when they first engaged the defendant he was induced to agree to adopt the pseudonym of "Stewart Rome," and, during his service as a kinematograph actor in the plaintiffs' employ, in this name alone he acted, was advertised and became known. The contracts contained the following clauses. [His

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Lordship read clauses 3 and 4.] It is upon the validity of these clauses and their true interpretation that the decision in this action depends.

On being demobilized the defendant joined a rival producing company known as "Broadwest Films, Ld.," at a salary of 20*l.* per week, the plaintiffs having offered to re-engage him at 10*l.* He disregarded the terms of the contract that I have read, and agreed (inter alia) to act as and to be advertised in the name of Stewart Rome in his new employment, and he has so acted and been advertised since, though his attention was called by the plaintiffs to the terms of his agreement before he joined Broadwest Films, Ld. The defendant has given certain reasons for his conduct, but as the matter I have to decide is, when the relevant facts are ascertained, principally one of law, I do not propose to discuss this part of the evidence, which is irrelevant to the issue.

The plaintiffs' contentions stated shortly are: (1.) That the contract in question is not one in restraint of trade, because the defendant is left free to employ his talents as and where he will, in his own name or under any pseudonym other than that of Stewart Rome. They rely on *Vernon* v. *Hallam* (1) and *Lotinga's Case.* (2) (2.) That if the agreement sued upon is in restraint of trade the restrictions imposed on the defendant thereby are not wider than is reasonably necessary for their protection for the following reasons: (*a*) They own thirty films or thereabouts in which the defendant has played, the value of which it is contended will be lowered if the defendant is allowed to be a party to the production of further Stewart Rome films, and especially if he should act in the future in inferior or second-rate productions. They say, in other words, that the pseudonym "Stewart Rome" is a valuable proprietary asset. (*b*) Additional Stewart Rome films advertised under another producer's name might lead to a wrong impression—namely, that the plaintiffs had been concerned in their production.

(1) 34 Ch. D. 748, 751.

(2) (1913) Times, November 13, p. 3*d*; November 14, p. 3*f*; November 15, p. 4*d*; November 17, p. 3*a*; November 25, p. 4*b*.

The defendant on the other hand contends that the contract is in restraint of trade; that it is solely one to prevent or render difficult competition in which the defendant is entitled to engage; and that the plaintiffs have no proprietary or other legal rights that they are entitled to protect by such provisions as those in question, and in consequence the restrictions are unreasonable and invalid.

The conflict between the sanctity of contract and the right to work—to which the parties to this action respectively appeal—is perhaps difficult in some cases to avoid, but whatever the difficulties in this respect have been in the past, they are largely minimized by the decisions of the House of Lords in *Mason's Case* (1) and *Saxelby's Case* (2), and the luminous exposition of the law on this subject to be found therein, and although the form in which the question in the present case arises is apparently novel, I think the answer to it is to be found in these two authorities. Before discussing their effect in relation to the case before me, I propose to refer a little further to the result of the evidence and the relevant facts established by it.

Before the determination of the defendant's contract of service with the plaintiffs he had become known to the public frequenting kinematograph places of entertainment as Stewart Rome. Few, if any, knew his real name. To the public to whom alone he cared or was able to appeal he was Stewart Rome and no one else, as effectively as if he had changed his name by deed poll. The plaintiffs' action in insisting upon his change of name and advertising him as some one other than he was when he entered their service, and his acquiescence in this procedure, effected this result. As Stewart Rome he attained a wide and, I presume, deserved success, so much so, that in a newspaper competition in the middle of 1915 as to who were the most popular kinematograph actors in this country, he obtained on a large poll the second place, being beaten only by the redoubtable Charlie Chaplin. The defendant thus acquired,

(1) [1913] A. C. 724. (2) [1916] 1 A. C. 688.

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as Stewart Rome, a wage-earning capacity of a high order. If, however, he has to be shorn of his acting name and begin life again in an unknown disguise, whether effected by using his original name or some other, his market value, to a producer of films, will be admittedly reduced for such a period as will enable him to re-establish his hold upon the public. This fact, if the plaintiffs succeed in this action, would either enable them to retain his services at a salary far below that which he could command as a free man, or would compel him to accept less than his market value elsewhere, until such time as he re-established his identity or made, as it were, a reputation equal to that which he now enjoys, for an apparently new individuality.

In this connection it must be borne in mind that the plaintiffs allege that on the true construction of the contract the defendant would be prevented, after leaving their service, from announcing to the public, or being a consenting party to the announcement by new employers, that he was the same person as the lately known Stewart Rome. The defendant did not contest this point before me. The plaintiffs concede that for the purpose of obtaining the agreement in writing from other employers referred to in clause 4 of the contract, he would be obliged privately to make known to them that such was the fact, but beyond that they say he may not go. I am not satisfied that the provision that the defendant shall not use the pseudonym Stewart Rome for any purpose whatever, read in conjunction with clause 4 as a whole, would prevent his announcing to the public that he was the late Stewart Rome or the person previously so called, or prevent him from acting for employers making a similar announcement, and if this is so the injury done to him by enforcing the contract would be considerably reduced. For the purposes, however, of this judgment, I will assume that both parties have rightly construed the language of the contract as above mentioned, though I should arrive at a similar result if the construction I have adumbrated is the right one. According to the evidence the defendant's market value to other producers at the present time would, if the plaintiffs' contention is to prevail, be reduced,

for a more or less uncertain period, running perhaps into years, by 50 per cent. or thereabouts.

Contracts of this character are unusual, and apparently unknown to many well-known people in the kinematograph world, though similar agreements have been made by two other producers, but to what extent I do not know.

If this form of agreement, construed as the plaintiffs construe it, becomes common or universal, the result will, in my judgment, be unwholesome and produce grievous injury to many members of a deserving and hard-worked profession. Young actors and actresses beginning their career in this kinematograph industry, which is so rapidly increasing, are, or will be as time goes on, practically compelled by competition and other circumstances, like many other beginners, to accept the wages and terms of employment held out to them, and if on every change of employment they are compelled to sink their identity and start afresh, so far as the names by which the public recognize them are concerned, unless and until their recognition in the theatre itself re-establishes their identity to the public at large, then the greater their skill and success, the greater will be the risk and damage they will have to face in order to become free to attain the position their work and ability entitle them to aspire to. Their other alternative will be to remain in their old employment, and be, probably in most cases, underpaid.

Now, the decisions of the House of Lords in *Mason's Case* (1) and *Saxelby's Case* (2) establish, if I read them aright, the following propositions: (*a*) Notwithstanding the sanctity of contracts between parties of full contracting power bargaining with their eyes open, a restraint inconsistent with the elementary freedom of an employee to earn his living as best he can, is, subject to certain exceptions, invalid. (*b*) With regard to the apparent antagonism between the right to bargain and the right to work, the extreme of the one destroys the other, and the law answers the public interest by refusing to enforce agreements when the right to bargain has been used so as to afford more than a reasonable protection

(1) [1913] A. C. 724. (2) [1916] 1 A. C. 688.

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to the covenantee. (*c*) This protection must fall far short of tyranny. (*d*) Where an employer has exacted a covenant in unreasonably wide terms, the Courts do not attempt to carve out of this void covenant the maximum that the employer might legally have exacted. (*e*) The exceptions to the rule that an employee shall not be prevented from earning his living as best he can include the right of an employer to protect his trade secrets and prevent his old customers from being wrongfully enticed away from him, but protection from competition is not among those exceptions, and there is apparently no case in which a covenant against competition by an employee has, as such, ever been upheld by the Courts. (*f*) Just as a vendor may subject himself to restraint in order to obtain the best terms on the sale by him of a business, so an employee may do so to obtain employment or training under a desirable employer, but in each case the restraint must be no more than is reasonable to afford adequate protection to the covenantee, and in the employer and employee case, competition, as such, is outside the area of protection that the law considers permissible, as is also protection against the use of the personal skill and knowledge acquired by the employee in his employer's service. (*g*) In restraint upon employees, nothing is sold or handed over by a present to a future possessor. The contract is an embargo upon the energy, activities and labour of a citizen, and the public interest coincides with his own in preventing him on the one hand from being deprived of the opportunity of earning his living and in preventing the public, on the other, from being deprived of his work and service. And lastly, (*h*) a man's aptitudes, his skill, his dexterity and his manual or mental ability may not nor ought to be relinquished by an employee. They are not his master's property, they are his own, they are himself. These propositions are taken literally or substantially from the opinions expressed by the learned Lords in the two authorities I have referred to, and I have not, in selecting or arranging them as I have done, consciously divorced them from any context by which they can or ought to be modified.

Do they or do they not apply to the case before me? In my opinion they do. They are not confined to contracts in restraint of trade but are of general application: *Horwood's Case.* (1) The function of law is to free and not to fetter liberty in the true sense of the term, irrespective of the particular circumstances under which it is appealed to, and this function is operative whether the sanctity of contract is being upheld on the one hand or the right of an employee to earn his living as best he can is being safeguarded on the other.

In my judgment however the contract sued upon in this case is in restraint of trade, not in the sense of being in absolute restraint, but because, having regard to the character and conditions of the defendant's work as an ex-employee, it places serious and injurious restrictions upon his earning his living in the manner and to the fulness that his abilities would otherwise enable him to do. For this reason it is tyrannous and oppressive. Further, for the reasons which I will deal with in a moment, it is not in any way limited to such protection if any as the plaintiffs are entitled in the circumstances to secure, and on this account it is unreasonable. The plaintiffs' contention that the defendant is left free to employ his talents as and when he will, and that therefore the contract is not in restraint of trade, is unsound in the circumstances of this case. Many considerations may be involved in the proposition that a covenant by a man not to trade in a particular name is not in restraint of trade and is permissible in law. It depends on the character of the trade and upon many circumstances whether it is in restraint of trade or not, and whether if it is in restraint of trade it is one which the law will or will not allow to be enforced.

In *Vernon* v. *Hallam* (2), which dealt with a covenant by a vendor of a business, including its name and goodwill, not to trade as therein mentioned under the name or style of John Hallam or Hallam Brothers, Stirling J. said: "It is not really a covenant against carrying on a trade, but against using a particular name or style in trade. It was contended

(1) [1917] 1 K. B. 305. (2) 34 Ch. D. 748, 751.

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that such a covenant is in restraint of trade. No authority was cited in support of the proposition; and it seems to me that it does not fall within the principle upon which a covenant in restraint of trade has been held to be bad." The decision in that case was obviously right. The restraint was not one of which the law disapproves. But the language of the learned judge cannot fairly be divorced from the class of case with which he was dealing. Nor can it be construed as meaning that no covenant by a servant not to trade in the only name by which he is known in his trade or profession, and upon the use of which his livelihood or success in life wholly or partially depends, can be deemed to fall within the principles laid down by the House of Lords as above set out.

That an agreement not to trade in a name may or may not, according to circumstances, amount to an illegal restriction upon trade or liberty, as dealt with by the House of Lords, seems to me to be beyond question. Let me take two extreme hypothetical cases: (1.) Suppose a bricklayer Stewart Rome agreed not in future to lay bricks under that name. No one can imagine his peace of mind or his pocket being affected, should he afterwards feel bound to comply with so ridiculous an arrangement. But (2.) Suppose a surgeon Stewart Rome, with a world-wide reputation, agreed to take down his plate, remove his quarters, and set up in a new locality under an unknown name, without the right to acquaint suffering humanity of his existence, whereabouts or disguise. It is conceivable that he might remain in obscurity for an indeterminate period, and suffer accordingly. I cannot doubt that such an agreement, under whatsoever circumstances it was entered into, would infringe the principles so clearly explained and laid down in the authorities I have quoted.

I will now consider whether the restrictions in this contract, assuming it to be in restraint of trade, are wider than is necessary for the adequate protection of the plaintiffs. Their films, in which the defendant has acted, will be of the same value, whether he produces other film plays in their employment or out of it, unless he should so conduct himself as to bring discredit on his name and acting. There is no suggestion

that he will do or contemplates doing so. His new employers are a company of good standing, and his and their interests are obviously opposed to his doing anything of the kind. Again I do not see how his taking part in the Broadwest productions can produce the wrong impression suggested by the plaintiffs. The whole interest of the Broadwest Co. is to advertise him as their new star, a star which is no longer shining in the plaintiffs' firmament. In any case the contract is in no sense limited to protecting the plaintiffs from any such problematical damage as they have suggested may be occasioned to them, and the real and only true object of the plaintiffs' contract is, in my opinion, to restrain or minimize the danger to them of the defendant's competition and nothing else, and as such it is unenforceable.

With regard to *Lotinga's Case* (1) it is impossible from the newspaper report to discover what argument, if any, took place on the question as to the injunction in that case, nor what evidence upon the subject was given, and the facts may have been widely different from those before me. In any case I am bound by the decisions in the House of Lords, which entirely cover the present case. The plaintiffs further say that they largely taught the defendant the business of film acting. Suppose they did. They do not seek to restrain him from disclosing trade secrets, trade names or canvassing customers. On the contrary he is to be free to serve and act for whomsoever he will, provided he assumes any name other than that which, for the purpose of his profession, is the only one he has.

Then it is said that Stewart Rome is a proprietary name. If so, notwithstanding the contract, the plaintiffs seem to me to have placed the proprietorship in the defendant's keeping. The agreement that it is to be their property is useless after they have merged it in the identity of another person, unless they can exercise their dominion and confer it upon some other nominee. This it is clear they cannot do under present circumstances. They can advertise and make what use they like of their stock of Stewart Rome

(1) [1913] *Times*, November 13, p. 3*d*; November 14, p. 3*f*; November 15, p. 4*d*; November 17, p. 3*a*; November 25, p. 4*b*.

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films and use his name in so doing, but this is not in virtue of the contract that the name shall be theirs, but because the films are their property.

Lastly, the plaintiffs were, I think, driven to contend or at all events did not, if I appreciated their arguments aright, deny, that a similar covenant, if made with regard to the defendant's original name of Ryott, would be enforceable. I cannot, with all respect to them, bring myself to regard this as being seriously arguable.

For these reasons, and especially if the true construction of the contract be as the plaintiffs contend, and whether it be so or not, and whether it is regarded as being in restraint of trade or not, I am of opinion that the plaintiffs' case fails, and there must be judgment for the defendant with costs.

G. R. A.

The plaintiffs appealed. The appeal was heard on Oct. 15, 16, 1919.

Hon. F. Russell K.C. and *Dighton Pollock* for the appellants repeated the arguments used in the Court below.

Patrick Hastings K.C. and *H. E. Wright* for the respondent were not called upon.

WARRINGTON L.J. This is an appeal from an order of Astbury J. dismissing the plaintiff's action. The plaintiffs are a company whose business it is to produce kinema films. The defendant is a kinema actor. The object of the action is to enforce an agreement by the actor, by which he is subject to certain restraints to which I will refer more particularly when I come to read the clause relating to the use by him, and the advertisement to the public, of a pseudonym or acting name under which he has passed in his profession as a kinema actor. The real defence to the action, which has been adopted by Astbury J., is that the contract in question comes within the principles under which contracts in restraint of trade are held to be prima facie void, as being contrary to public policy, and is not within the well-known exception from the generality of that rule in regard to contracts which

contain provisions reasonably necessary for the protection of the person with whom they are entered into.

The question is, Was Astbury J. right in the view which he took? The facts of the case are not in dispute. The plaintiffs are a company whose business it is to produce kinema films. Having produced a film, they then proceed to sell that film to middlemen who are called renters, and these renters then proceed to deal with the film, and the right of producing it, by conferring those rights upon the proprietors of kinema theatres. That, speaking generally, is the course of the business in this particular trade. For the purpose of producing these films it is the practice of the film-producing firm—there are only nine or ten in this country—to have what is called a stock company, and apparently, judging from the agreement which we have before us, and also from what was stated in evidence, they as far as possible impose upon the actors forming part of that stock company a pseudonym for the purpose of advertisement, and they advertise in the trade papers their films, with the names of the actors; and where the actors are performing under a pseudonym they, of course, advertise that pseudonym.

The defendant was an actor by profession. He started the profession of an actor in the year 1905, and from that time until the year 1913, with some interruption, he acted here and in Australia in his own name. In 1913 he entered into a contract with the plaintiffs to act as a kinema actor as part of their stock company. We have not before us the agreement which he made in 1913, but, so far as I know, it was substantially the same, except that the salary was much smaller, as that into which he entered in 1915, and which is the contract sued upon. He and the company adopted—I am using as far as possible a neutral term—as his pseudonym the name of "Stewart Rome." He proved a very powerful kinema actor, and films which represented him in a leading rôle became extremely popular with the renters, with the kinema theatre proprietors, and with the public; so that the name of "Stewart Rome" added largely to the value of the films which were produced, and, of course, became

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also a very important item in the equipment of the defendant himself, and an element in enabling him to earn a salary in the profession which he had adopted. Under those circumstances the agreement in question was made. It was made on October 29, 1915, at a time when the defendant was still in the employment of the plaintiff company under his previous contract. The contract provides first: "The company engages the artiste to dance, act, and perform, for the purpose of being photographed, to the best of his or her ability as required by the company, such parts as the company or its representative may allot for this purpose for a period of twelve months, at a salary of seven pounds per week, this engagement to commence on the 1st June, 1915" (that is, four months before the date of the contract), "and to terminate on the 31st May, 1916, unless determined by the company as hereinafter provided and subject to the terms and conditions hereinafter set forth." Pausing there for one moment, it is an absolute contract on the part of the defendant to act for the company for a whole year ending May 31, 1916, though the company, under the provisions of the agreement, could determine it in certain events. Then the second clause provides—I need not read it in full—that he shall not act for any other employer during that time. Then the third clause is important: "If the company advertise the artiste" —it is to be observed there is the condition that it is only if they advertise the artiste—"they will do so under the pseudonym of 'Stewart Rome,' and the right to use such pseudonym or any other pseudonym hereinafter agreed upon in connection with photoplays or otherwise shall be the sole property of the company." Again pausing for one moment upon that, I fail to see how the name under which this gentleman acts can possibly be the subject of property in the company. One understands property in a trade mark; one understands property in the copyright of some literary or artistic production; but how there can possibly be property in the use by an actor of a pseudonym passes my comprehension. It only means, at the most I think, that the artiste shall not, as between himself and the company, have the

right to use that name without their consent. If it means that, then for the purposes of this agreement it really means nothing, because the same provision, as will be seen, is contained in another clause of the agreement. The clause in the agreement that is sued upon is the fourth. [His Lordship read the clause as set out above, and continued:] The subsequent clauses of the agreement are, most of them, not material; but there are two which are material. The first of those is the eighth. "If the company shall cease to make photoplays for more than six consecutive days, whether by reason of fire, epidemic, strikes, lockouts, or any other cause which the company in its absolute discretion may consider adequate, or if the company shall sell or otherwise dispose of its business and/or its studio, then the company may by notice in writing to the artiste forthwith determine this agreement." The point of that is, the power is given to the employer, in certain events, to terminate the agreement; no corresponding power is given to the employees. Then clause 14 provides: [His Lordship read the clause, and continued:] Now, therefore, one day before May 31, 1916, they might exercise this option, and if they do so, for another year—for I will assume that that option can only be exercised once, though it has been contended that it may be introduced nto the new agreement constituted by its exercise, and be exercised from time to time over and over again; I will assume that it is not so oppressive as that—but for another year, at the very moment before the termination of this agreement they may impose upon him the obligation of serving them for another year at an advance of no more than 1*l.* on the salary which he has been earning at the time this agreement was made. I have now mentioned all the material clauses in the agreement.

I now propose to go through the fourth clause to see exactly what it is that it purports to do, and the restrictions which it purports to impose upon the actor. First, he is not to use the pseudonym for any purpose whatever; that is to say, supposing he desires to revert to his profession of an ordinary stage actor, he would be prohibited by this agreement from

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acting under this name of "Stewart Rome." How that can possibly be required for the protection of these film producers seems to me to be quite unintelligible. Then the second branch of the clause is: "He shall not dance, act, perform, or otherwise pose for the purpose of being photographed by any person, firm, or corporation, or agree so to do, unless and until the said person, firm, or corporation have agreed in writing with him or her not to expose photographs of him or her under such pseudonym." That is intended to prevent the exhibition, outside the kinema theatre, for the information of the public as to what is taking place inside, of a photograph of this gentleman, either in character or in the ordinary dress of an English gentleman, under the name of "Stewart Rome." Then the third sub-clause is: "He shall not dance, act, perform, or otherwise appear in any theatrical, dramatic, or spectacular entertainment under such pseudonym." There, again, that only contains as a particular provision that which would be covered by the more general provision to which I have already referred—namely, that he shall not use the pseudonym for any purpose; but it is quite clear upon the words of it that it would prevent this gentleman from performing on the stage, not for the kinema at all, but from performing on the stage under the name of "Stewart Rome." Then the fourth sub-clause, which is the provision which it is mainly sought to enforce in this action, is that "he shall not agree with any person, firm, or corporation to dance, act, perform, or otherwise appear in such theatrical, dramatic, or spectacular entertainment"—again not confined to kinema—"unless and until such person, firm, or corporation have agreed in writing with him not to announce or advertise his act, dance, or performance or other appearance under such pseudonym." That is the agreement sued upon.

This contract expired, by the effluxion of time, on May 31, 1917. It had been renewed for one year, but meanwhile, in January, 1917, the defendant had been called up for military service, and was engaged in military service until the end of the year 1918. While he was still on military service and after the period of the contract had expired, certain

correspondence took place between him and a representative of the plaintiff company as to his re-entering their service at a salary of 10*l.* per week. However, no agreement had actually been come to, and on January 25 he made a contract with another film-producing company to act for them at a salary of 20*l.* per week and did not require them to enter into an agreement not to announce or advertise his performance under the name of "Stewart Rome," that is to say he unquestionably committed a breach of the fourth sub-clause of the fourth clause of his agreement with the company. I think that is all I need state of the facts.

The first question is, Is this provision within the principle rendering void and unenforceable contracts which are in restraint of trade? The material fact with reference to that appears to me to be this: this gentleman, while posing for the plaintiff company under the name of "Stewart Rome," acquired a particular item of equipment—namely, the popularity which his name of "Stewart Rome," coupled with his skill in acting, had acquired for him. It is in evidence that the popularity of the films in which the name of "Stewart Rome" appeared as one of the principal characters was exceedingly high; in fact it is stated in evidence that in a competition, held under circumstances that we do not know, but it does not very much matter, the famous name of "Charlie Chaplin" appeared at the head of the list, and that of "Stewart Rome" appeared second. I only mention that as showing that the name of "Stewart Rome" as a kinema actor had attained a very high degree of popularity. Of course the result of that is that the film producer who is able to announce a film in which the name of "Stewart Rome" appears can obtain a higher price for that film than the film producer who cannot advertise the name of "Stewart Rome"; not only that, but the defendant himself owing to that fact is enabled to command a higher price for the services he performs for that film-producing company.

Accordingly the pseudonym of "Stewart Rome," and the right to use that pseudonym for the purposes of his profession has become—not owing as far as I can see to anything

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that the company have done—an important item in this gentleman's professional equipment. I say "as far as I can see, nothing the company have done"; I am not forgetting that the company knowing they have a valuable asset in Mr. Stewart Rome have spent considerable sums in advertising the films in which he appears; but they do that for their own purposes, and in order to obtain the higher price which the fact I have referred to enables them to command. Incidentally no doubt it increases the value of Mr. Stewart Rome's qualifications to himself, but the real object of the advertisements is to obtain a price for their films. That being so, the name of "Stewart Rome" is an important item in the professional equipment of the defendant and one which he has made of importance by his own skill, by his own personal qualifications, and no doubt by his attention to that which is necessary in order to make a good kinema actor. If this agreement were to be enforced he would lose that item of equipment for the period, impossible, of course, of definition, during which, either by using his own name or by using another pseudonym, he is acquiring over again that item of equipment as attached either to his own name or another pseudonym as the case may be. He is therefore prevented from going into the market with the full equipment which he has acquired in the practice of his profession. Is his being so prevented in effect in restraint of trade, to use the technical expression applicable to such cases? It may be said there is now no dispute about the law, but I propose to read one or two passages in which learned judges, all of them addressing the House of Lords, have expressed their views as to what is meant by a contract in restraint of trade. Lord Macnaghten, in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (1), in a passage quoted by Lord Haldane in *Mason* v. *Provident Clothing and Supply Co.* (2), says this: "The public have an interest in every person carrying on his trade freely; so has the individual. All interference with individual liberty of action in trading, and all

(1) [1894] A. C. 535, 565. (2) [1913] A. C. 733.

restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned, and reasonable in reference to the interests of the public so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public." It is also pointed out in *Mason's Case* (1) that there is a clear distinction between contracts entered into upon the sale of a goodwill for example, and contracts entered into between an employer and an employee, and for the simple reason that contracts for the protection of goodwill are to protect an item of property which is being sold by the covenantor for a consideration which he receives from the covenantee. There is one other passage to which I ought to refer. It is in the speech of Lord Shaw. (2) He is dealing with the case of a servant seeking fresh employment, and using information which he has obtained in the course of his employment by his previous master, and he goes on to say this: "Upon this last point, my Lords, there was much argument at your Lordships' Bar as to whether this case did not fall within the principle of *Haynes* v. *Doman*. (3) But *Haynes* v. *Doman* (3) was a case, and was expressly so treated, of the divulging of trade secrets, and of a servant entering into new employment carrying with him these trade secrets, with the constant risk of divulging them to rival manufacturers. Such cases, my Lords, are, in my opinion, widely distinguished from the other cases of an employee who, by faithful and industrious exercise of his powers, becomes mentally, or even manually, well equipped as a servant. The distinction between that case and the former is as wide

(1) [1913] A. C. 724.
(2) [1913] A. C. 740.
(3) [1899] 2 Ch. 13.

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as the psychological distinction between subjective and objective knowledge. But it is also as real. For, in the former case, the equipment of the workman becomes part of himself, and its use for his own maintenance and advancement could not, except in rare and peculiar instances, be forbidden. But in the other case the knowledge of trade secrets may be as real and objective as the possession of material goods, and the law would much more readily support a restraint of liberty which would, or might, be likely to induce the transfer of this to others, with the danger of consequent loss. In all cases of restraint sought to be put upon an employee under a contract between master and servant this distinction should be borne in mind." I refer to that passage because the learned Lord is there dealing with the case of an item of equipment which the servant has obtained by his own efforts while in the employment of his master, and saying that, as regards that item of equipment, he cannot properly be deprived of the advantage of it, unless there are exceptional circumstances which would justify his being so deprived. As I have said, in this case this gentleman is possessed of an item of equipment which, it is undisputed, is of value to him. This contract if carried into effect would deprive him of that item of equipment and would render it necessary for him to re-acquire it in an undefined period of time. For that reason it seems to me that this agreement is within the principle which renders void contracts in restraint of trade. It is an interference with the right of the defendant to use those qualifications of which he is possessed to the best advantage for himself and for the public, and as such it is contrary to public policy. It was said by Mr. Russell, and this was really the foundation of his argument, that there is nothing to prevent the defendant from acting for whomsoever he pleases as a kinema actor after the termination of this agreement. In my opinion that is not enough. No doubt he can without breaking this agreement act as a kinema actor, but he would do so maimed and crippled by the loss of that which is at the present moment the source of his popularity, and the qualification which enables him to earn a high remunerative salary. He would have to

go back to the beginning and earn probably not more than 6*l.* a week, whereas he is now able to obtain 20*l.* In my opinion the agreement is in restraint of trade.

The only other question is, Does it come within the exception? Is there anything in this agreement which is necessary for the reasonable protection of the previous employer? As far as I can understand it can hardly be suggested that there is anything to be protected. If there is anything it is the thirty or thirty-one films produced by the plaintiffs, in which Mr. Ryott is represented. A suggestion was made that the value of these films might be destroyed or impaired if the defendant, under the name of "Stewart Rome," were to act for other employers in some objectionable or vulgar performance. It seems to me that is fantastic. But it does not end there. On the evidence, seeing that the defendant ceased, when he was called up in January, 1917, nearly three years ago, to act for the plaintiffs, every film in which he appears must be at least two years and three-quarters old, and the evidence is that the life of a film is certainly not more than three years, except in very exceptional circumstances where it may be reissued. It is hardly suggested that if the contract is in restraint of trade there was anything in this that is reasonably necessary for the protection of the employer. I have only to say one word more: I think it is pretty obvious that the object of this agreement is not to protect any property of the employers which they may have in any films which they produce; the real object of it is to bind the particular actor to that particular employer, if under the use of the selected pseudonym he has acquired a popularity so as to make it worth the while of the employers to retain him in their service. That I think is obviously the true object of this agreement, and I am glad to think that by our decision that object will probably be defeated. In my judgment the decision of Astbury J. was right, and this appeal ought to be dismissed.

ATKIN L.J. The defence to the action brought in this case is that the contract sued upon is in restraint of trade, and the

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argument that was addressed to us was almost entirely based upon the contention that this agreement was not in fact in restraint of trade as that doctrine has been authoritatively laid down by the Courts. I will quite shortly state what has been decided in reference to the doctrine of restraint of trade. The authoritative judgments that have been given lately I think are the speeches of Lord Parker in the House of Lords and in the Privy Council. I do not refer to his judgment in the Privy Council in *Attorney-General of the Commonwealth of Australia* v. *Adelaide Steamship Co.* (1) in which Lord Parker delivering the judgment of the Privy Council stated in some detail the principles of this particular doctrine; but in *Herbert Morris, Ld.* v. *Saxelby* (2) Lord Parker says this, affirming and adopting the decision of Lord Macnaghten in the *Nordenfelt Case* (3): "As I read Lord Macnaghten's judgment, he was of opinion that all restraints on trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. It is not that such restraints must of themselves necessarily operate to the public injury, but that it is against the policy of the common law to enforce them except in cases where there are special circumstances to justify them. The onus of proving such special circumstances must, of course, rest on the party alleging them." So far that lays down that a restraint of trade is prima facie contrary to public policy. It is a misapprehension to suggest that this doctrine is confined merely to restraint of trade in any ordinary meaning of the word "trade"; it extends further than trade, it undoubtedly extends to the exercise of a man's profession or calling, and if authority is needed for that I think it is found in the passage in the judgment of Farwell L.J. in *Sir W. C. Leng & Co., Ld.* v. *Andrews* (4), which was also quoted with approval by Lord Shaw in *Mason's Case* (5), and by Lord Atkinson in *Herbert Morris, Ld.* v. *Saxelby.* (6) The passage to which I refer is this: Farwell L.J. says

(1) [1913] A. C. 781.
(2) [1916] 1 A. C. 688, 706.
(3) [1894] A. C. 535.
(4) [1909] 1 Ch. 763, 773.
(5) [1913] A. C. 724.
(6) [1916] 1 A. C. 688.

referring to the passage cited by Lord Macnaghten: "That doctrine does not mean that an employer can prevent his employee from using the skill and knowledge in his trade or profession which he has learnt in the course of his employment by means of directions or instructions from the employer. That information and that additional skill he is entitled to use for the benefit of himself and the benefit of the public who gain the advantage of his having had such admirable instruction." I think that makes it quite plain, if authority were needed, that the doctrine was not merely confined to restraining commercial transactions as such. What is meant by "restraint of trade"? There are one or two passages that I should like to read with a view of indicating the broad way in which this has been considered by the learned judges who have had to deal with the matter. The first passage to which I should like to refer goes back almost to the source of this doctrine. It occurs in *Mitchel* v. *Reynolds* (1), where Lord Macclesfield said: "The true reasons of the distinction upon which the judgments in these cases of voluntary restraint are founded are, first, the mischief that may arise from them first, to the party, by the loss of his livelihood, and the subsistence of his family; and secondly, to the public by depriving it of a useful member." And, developing the doctrine and explaining the kind of restraint which is considered objectionable by the Courts, there are one or two passages which I think help one to understand what is meant. Lord Shaw in *Mason's Case* (2) says this: "My Lords, conflicting considerations are in such cases immediately presented to the mind. Here is a bargain, it is said, between two parties having full contracting power and with their eyes open. It is not void or voidable under any of the familiar categories which justify rescission. Why then should the law decline to hold parties to it? On the other hand, it is said, here is a citizen who has come for a period of years under a restraint which is inconsistent with elementary freedom, namely, the freedom to earn his living as best he can. This is a freedom

(1) (1711) 1 P. Wms. 181, 190; 1 Smith's L. C., 11th ed., 412.

(2) [1913] A. C. 737.

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which it is not alone in his interest, but in the public interest, that the law should protect." And in a later passage Lord Shaw says (1): "In my opinion there is much greater room for allowing, as between buyer and seller, a larger scope for freedom of contract and a correspondingly large restraint in freedom of trade, than there is for allowing a restraint of the opportunity for labour in a contract between master and servant or an employer and an applicant for work."

Again in dealing with the contract in that case, which created a restriction on an employee, he says (2): "No workman could have the freedom to dispose of his own labour, or risk a movement towards his own advancement, under what might turn out to be the cruel operation of such a clause." The only other passage I wish to cite is that which my Lord has read from the speech of Lord Shaw in *Herbert Morris, Ld.* v. *Saxelby* (3), and which I will not read again, but there is a passage at the end of it which my Lord did not read, to which I will call attention. Lord Shaw there says: "There is no public interest which compels the rendering of those things dormant or sterile or unavailing; on the contrary, the right to use and to expand his powers is advantageous to every citizen, and may be highly so for the country at large." Lastly, in *Mason's Case* Lord Moulton said this (4): "It is evident that those who drafted this covenant aimed at making it a penal rather than a protective covenant, and that they hoped by means of it to paralyse the earning capabilities of the man if and when he left their service, and were not thinking of what would be a reasonable protection to their business, and having so acted they must take the consequences."

I ask myself what is the effect of this contract in reference to the restraint which has been put on the man's activities as judged by the passages which I have just read. It appears to me quite plain that the result of this contract was to deprive the man of the reputation which he had earned

(1) [1913] A. C. 738.
(2) [1913] A. C. 741.
(3) [1916] 1 A. C. 714.
(4) [1913] A. C. 746.

under what was his professional name, that is to say the only name in which he was known as a film actor, and it is plain upon the evidence that the effect of depriving him of the right to use the professional name which he has used, and the only name which he has used in his profession for five years, is to diminish his earning capabilities. It is obvious that that which is of value to him is the fact that he has achieved a certain reputation in his calling, and that if those who employ him are not to be allowed to advertise and make known to the public the fact that they have the advantages of the services of a skilled artist, they will not pay him as much for his services as they would if they were free to make full announcement to the public of the person whom they have secured for their service. Here on the evidence it is clear that if that is measured in money, it represents one-half of the man's earning capabilities, certainly for a substantial time; for how long it is not easy to know. Quite apart from gauging it in money it appears to me that there are other considerations which are just as important—specially important to an artist in a profession such as this, who it appears to me depends very largely for his success in life upon his reputation with the public. This man has built up and acquired a public reputation. Ordinarily speaking I suppose, it is one of the most legitimate and certainly one of the strongest incentives to good work in this world that a man tries to improve his reputation; he honestly seeks to increase his reputation and tries to make his work worthy of his reputation, and so to climb from height to height. In this particular case the effect of this contract is that having worked for five arduous years in this particular calling the defendant has, like Sisyphus, rolled up his burden to a certain height, and if this contract be enforced he will fall back again and have to start afresh and win another reputation, not even under the same identity, but under a name which is unknown to the public. It appears to me that that in itself is a deprivation of a man's liberty of action, and it diminishes his aptitude apart from paralysing his capacity. Perhaps in a slightly different application Mr. Ryott might say that

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> "who steals my purse steals trash; . . . .
> but he that filches from me my good name
> robs me of that which not enriches him
> but makes me poor indeed."

I myself am satisfied that at any rate this contract is plainly in restraint of trade within the meaning of the doctrine.

The only other question is whether or not the restraint of trade is justified as being a protection that is reasonably necessary and no more than is reasonably necessary for the protection of the employer's interests. What was the object of this clause as stated in evidence by the employer who entered into it? I will read a short passage from the short-hand notes. This is in the examination-in-chief. "(Q.) If the name were used by any one else than your firm how do you suggest that it would injure you? (A.) It would give a wrong impression, would not it? (Q.) First of all you say it would give a wrong impression. (A.) The name has been so long associated with our firm. (Q.) You mean in connection with the Hepworth Picture Films? (A.) Yes. (Q.) What do you mean when you say it would give a wrong impression? (A.) I think it would convey the impression that the picture which was being advertised had been made by us." If that means anything at all it is a suggestion of passing off, and we have not heard a single suggestion of any sort or kind that that was the real reason; and it is quite plain there is nothing in it, because any films produced by a rival firm would be advertised as produced by themselves, and there could be no suggestion that they were seeking to pass them off as the films of the plaintiff company. Then there is another suggestion which I think rather emanates from counsel, because it is put in the form of a leading question: "Assume that the name were used in connection with plays of inferior standard to yours, would that prejudice you? (A.) Yes, I think it would." We have heard some sort of suggestion as to that which to my mind is mere pretence and make-believe; there is no real foundation for it at all. I do not believe Mr. Hepworth ever thought of it for a single

moment; nor can I imagine how a clause such as this could be justified upon such a ground as that. It would apply to every case where a man was employed in his own name for however short a time if in fact the name of the servant was associated with the product or the output of the master. In every case the master might say, You must change your name because your name, if employed afterwards in connection with other goods, may be used in connection with goods which are of inferior quality to ours. I do not think it necessary to say more on that suggestion. Then the passage in the evidence goes on: "(Q.) And you have had up to now a monopoly in that name? (A.) Yes." Well, that is true. All that means is, that the man who was called by that name had only acted for that particular company. "(Q.) How would it affect you if other plays were subsequently staged and filmed with Mr. Stewart Rome's name advertised with them? (A.) It is very difficult to say, but I assume it would reduce the value. (Q.) They would be competing films? (A.) They would be competing films." That suggestion is I think plainly met by the authorities referred to by my Lord which show that it is not sufficient justification for a restraint of trade that the servant might help his new employer to compete with the old employer; that in itself is not sufficient. Those are the only reasons that are put forward by Mr. Hepworth, so far as I have been able to go through his evidence, to justify this particular clause. They seem to me to be entirely insufficient. But in cross-examination a further reason appeared, which I think approaches very much more nearly to the real reason in this particular case: "(Q.) Do you really think it was for the reasonable requirements of your business that that should be done? (A.) Yes. (Q.) You concede, do you not, that supposing the name is of value to the artiste, about which we may have our own opinion, you have a tremendous hold over these people if you can make them sign an agreement like that? (A.) Yes; it gives some hold, certainly. (Q.) Supposing it is right that an artiste has to begin life more or less over again, we will take only half his marketable value, you can go on paying these people

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half their marketable value as long as they stay with you because they dare not go anywhere else. That is right, is it not? (A.) It seems a logical deduction from your premises. (Q.) But do you not think it is a fair deduction from your agreement? (A.) No, I do not think that." It appears to me that that is the real essence of this agreement. To my mind it gives the employer a hold upon the artists who sign these agreements, and etymologically I can draw no distinction between a restraint and a hold upon the employee. I think it was intended to give a hold upon the employee, and to my mind it was entirely unreasonable and unfair; I consider this a most unconscionable clause, and I am very glad, therefore, to think that such an agreement can be brought before the Court, and that the Court will refuse to enforce it. Anything more intolerable than that young people of either sex should be compelled to enter into such agreements, giving the employer power to filch from them their identity if they should turn out to be artists of any value, I cannot conceive.

I am glad to think as a result of this decision that this clause will probably now disappear. There might be a further question whether or not this clause is excessive, even if it were required for the protection of the employer at all. Upon that I entirely agree with what fell from my brother Eve during the argument, when he pointed out that this was a restraint that operated during the whole of the man's life, whereas the life of a film was in substance only six or nine months, with a possibility of its extension for three years. I entirely agree with that view. Upon all these grounds it seems to me that the decision of the learned judge below was quite right, and that this appeal should be dismissed with costs.

EVE J. The question in this case is whether clause 4 of the agreement of October 29, 1915, on which the action is founded, is one which can properly be described as a contract in restraint of trade. If that question is answered in the affirmative the further one arises whether its operation is

more extensive than is necessary for the reasonable protection of the covenantees.

What is meant by the expression "contract in restraint of trade"? It means a contract whereby a restraint is imposed upon the liberty of an individual to earn his living or exercise his calling, or in other words a contract whereby the individual liberty of action in trading is interfered with and controlled. What we have to consider is first whether the restrictions imposed on the covenantor in clause 4 of this agreement have that operation. In this connection it is very material to bear in mind that counsel for the appellants was constrained to admit that, if clause 3 of this agreement had been omitted, and if the respondent had acted and performed and been advertised in his own name, the appellants would still, in order to make their argument logical, have been bound to contend that the contract was not one in restraint of trade. In construing clause 4, therefore, we are entitled to read it as though the references to the pseudonym were omitted and as though it dealt only with the respondent's own name. Just see by taking clauses *a* and *d* what the effect of the sub-paragraphs would be. The first one would be, "The artiste shall not use his own name for any purpose whatever," that is after leaving the employment of the plaintiffs. Then he was to obtain from any persons into whose employ he was about to enter a written contract that they would not allow him to "dance act perform or otherwise appear in any theatrical dramatic or spectacular entertainment or announce or advertise his dance act or performance or other appearance under his own name." Can it be said that these are not stipulations designed and calculated to deter the covenantor from transferring his services and his qualifications to a competitor in trade? Mr. Russell took exception to one passage in the judgment below where the learned judge says: "By an ingenious device made use of by the company when it first engaged the defendant he was induced to agree to adopt the pseudonym of 'Stewart Rome,' and during his service as a kinematograph actor in the plaintiff's employ in this name alone he acted, was advertised, and became known."

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I do not think there was evidence to show that there was any inducement on the part of the plaintiff company which led the defendant to adopt the name, but I do say that in my opinion the insertion of the clause in this agreement requiring the artiste to adopt the pseudonym was a device—I am not using the word in any opprobrious sense—for controlling the employee after leaving the service of the employer by an attempt to create in the employer some proprietary right in the name by which the employee had been designated and become identified in his profession. It is a device which in my opinion has failed—failed because when the argument is pressed to its logical conclusion it comes to this: that the appellants here are obliged to contend that if the adoption of the pseudonym were dropped altogether this contract would still not be a contract in restraint of trade although a man by its very terms agrees not to use his own name for any purpose whatever, and that he will not be advertised as an actor in this particular business or anything connected with it, in his own name. I think it is quite impossible, upon the true and fair construction of this agreement, to come to any other conclusion than that the contract is in fact a contract in restraint of trade, and having arrived at that there really is very little left in the case. The suggestion of there being any right or property of the employer which this contract was necessary to protect is shadowy in the extreme, and even had there existed such a right or property I am of opinion that it was of so transitory a nature, of so ephemeral a character, that the imposition upon the employee of a restraint extending during the whole of his life is altogether unreasonably wide and far more than was necessary for the due protection of that right, if it existed. For these reasons I agree in thinking that this appeal fails, and must be dismissed.

Appeal dismissed.

Solicitor for appellants: *William Percy Guillet.*
Solicitors for respondent: *Romer & Skan.*

G. A. S.

In re CAMPBELL (An Infant).

EVE J.
1919
July 25, 31.

[1919. C. 909.]

Practice—Jurisdiction—Originating Summons—Service out of Jurisdiction—Scotland—Husband and Wife—Custody of Infant—Guardianship of Infants Act, 1886 (49 & 50 *Vict. c.* 27)—*Rules of the Supreme Court*, 1883, *Order XI., r.* 8A.

The Court or a judge has no jurisdiction to order service of any summons other than a writ of summons on a party or person in Scotland.

The words "foreign country" in r. 8A of Order XI. of the Rules of the Supreme Court, 1883, have precisely the same meaning as in r. 8, and neither rule applies to Scotland, or to any other part of the British Dominions.

Motion.

On May 9, 1919, an originating summons was taken out under the Guardianship of Infants Act, 1886, by Dorothy Clotilda Campbell, wife of Colonel W. MacLaren Campbell, asking for the custody of her infant daughter Anne Elspeth Campbell. The father, who was respondent to the summons, was a domiciled Scotchman, and on May 20, 1919, he presented a petition in the Scotch Courts claiming the custody of the infant, who was one year and ten months old. Leave to serve the originating summons upon him at Broughty Ferry, N.B., out of the jurisdiction of the Court, was obtained from Eve J. on May 28, 1919.

On June 17, 1919, notice of motion was given on behalf of Colonel Campbell, asking that this order of May 28, 1919, might be discharged, on the grounds (1.) that the respondent was not domiciled or ordinarily resident within the jurisdiction of the Court (2.); that the relevant facts and circumstances within the knowledge of the applicant, D. C. Campbell, were not fully and accurately set forth in the affidavit in support of the application for leave to serve the summons out of the jurisdiction; and (3.) that the subject matter of the application did not fall within any of the cases in respect of which service out of the jurisdiction was allowed. The main point discussed

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was the jurisdiction of the Court to serve an originating summons on a party in Scotland. There was evidence that the respondent was on temporary military duty in Scotland and had not, for more than a year, been ordinarily resident in England, though occasionally coming to his wife's house at Old Warden Park, Biggleswade, to see his child.

Clayton K.C. and *Sheldon* for the motion. There are two grounds on which this motion should succeed. First there is no jurisdiction for the Court to give leave to serve this originating summons in Scotland. It is not a foreign country, to which alone Order XI., r. 8 and r. 8A, apply. (1)

These rules only apply to service in a foreign country, whereas Scotland is part of the United Kingdom. The only power to serve out of the jurisdiction is under statutory enactment, and the rules must therefore be construed strictly. There is a difference in the wording of rr. 1, 3, 4, and 7 of this Order XI. and r. 8. In the first case the service referred to is "out of the jurisdiction," whereas in r. 8 the words used are service "in a foreign country," and they are used for the first time.

In re Busfield (2) applies, and is conclusive on this point of jurisdiction.

It was also held in *Rasch & Co.* v. *Wulfert* (3) that there was no jurisdiction to allow service out of the jurisdiction of a summons for leave to enforce an award. A "foreign country" means a country which is not included in the dominions of the Crown. Stroud's Judicial Dictionary, 2nd ed., vol. ii., p. 745. A second ground in support of the motion is that the applicant, Colonel Campbell, is not "ordinarily resident" within the juris-

(1) Rules of the Supreme Court, 1883:—

ORDER XI.

Rule 8: "Where leave is given to serve notice of a writ of summons in any foreign country to which this rule may by order of the Lord Chancellor from time to time be applied," certain procedure is directed to be adopted.

Rule A: "The Court or a judge may direct that any summons, order or notice shall be served on any party or person in a foreign country, and the procedure prescribed by Order XI., r. 8, with reference to service of notice of a writ of summons shall apply to the service of any summons, order or notice so directed to be served."

(2) (1886) 32 Ch. D. 123, 131.

(3) [1904] 1 K. B. 118.

diction as alleged by the respondent to the motion and the full facts were not brought to the notice of the Court.

Maugham K.C. and *Henry Johnston* for the respondent, Mrs. Campbell. The child is in England and there is jurisdiction in the Court to be exercised here: *Johnstone* v. *Beattie*. (1) There is no property of the infant in Scotland, and proceedings there will be sterile for any useful purpose. The object of r. 8A is to enlarge the scope of Order XI., so as to apply to all summonses, orders, and notices, and in this case notice might have been properly given to Colonel Campbell, by letter or otherwise, of the proceedings which had been taken, without any leave of the Court: *In re Cliff*. (2) A "foreign country" must be taken to mean a country where a different system of law prevails, as in Scotland.

Clayton K.C. in reply.

Cur. adv. vult.

July 31. EVE J. This motion whereby the applicant, Colonel William Campbell, a domiciled Scotchman, seeks to have discharged an order of May 28 last giving liberty to serve on him out of the jurisdiction the originating summons issued by his wife under the Guardianship of Infants Act, 1886, raises the question whether the Court or a judge has jurisdiction to order service of any summons other than a writ of summons on a party or person in Scotland.

It is clearly established that there can be no jurisdiction in an English Court to allow service of process out of the jurisdiction except by statutory enactment, and it is conceded that the statutory enactment applicable to this case is to be found—if at all—in r. 8A of Order XI. That rule is in these terms: "The Court or a judge may direct that any summons, order or notice shall be served on any party or person in a foreign country, and the procedure prescribed by Order XI., r. 8, with reference to service of notice of a writ of summons shall apply to the service of any summons order or notice so directed to be served." There is nothing in the rule itself from which one would readily conclude that its operation was

(1) (1843) 10 Cl. & F. 42. (2) [1895] 2 Ch. 21.

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intended to extend to Scotland. It is limited in terms to service on a party or person in a foreign country, and it applies to that service the procedure of r. 8, which is strictly confined to foreign countries. Moreover, although r. 8 was the last rule in the order when the new rule was added in 1909, it was not added as r. 9 but as 8A, a circumstance which tends to support the view that it was regarded as an addendum to r. 8 rather than as an independent rule affecting the whole order.

But on behalf of the respondent to the motion it has been argued that the intent with which the rule was introduced was to extend the ambit of the order to the service of summonses, orders, and notices, and that the expression "foreign country" means any country in which a different system of law prevails, in other words, any country of which the law might, from our standpoint, be spoken of as "foreign law."

There is not wanting authority to support this contention to some extent. In the case of *In re Aktiebolaget Robertsfors and La Société Anonyme des Papeteries de L'AA.* (1), the late Lord Chief Justice Alverstone says: "As I understand the operation of r. 8A it is this. The previous operative part of Order XI. which applies to writs of summons, had caused a difficulty with regard to the service of other notices or summonses which the Court or the parties desired should be served on persons abroad, and particularly with regard to the service of originating summonses which, as Collins M.R. pointed out in *Rasch & Co.* v. *Wulfert* (2), are the nearest approach to writs of summons, and accordingly r. 8A was added. The effect of that appears to me to be perfectly clear. The first portion of it extends the ambit of the rules, other than r. 8, to other official proceedings beyond writs of summons—to a summons, to an order, or to a notice. But the state of circumstances which justifies the Court in granting leave for service out of the jurisdiction under Order XI. of a document of that character must still be shown. The rule then proceeds to say that as to documents which come within the provisions of r. 8, which relates only to

(1) [1910] 2 K. B. 727, 732. (2) [1904] 1 K. B. 118.

certain countries to which the Lord Chancellor has directed it to apply, the provisions of r. 8 shall apply. That construction makes r. 8A perfectly intelligible."

And much to the same effect is what Pickford J., as he then was, adds where he says (1): "It seems to me that the effect of that rule—r. 8A—is pretty clear. The intention is to place summonses, orders, and notices on the same footing as writs, and to give power to serve them out of the jurisdiction in the same way that writs are served." But these observations must be read in the light of the case with which the Court was there dealing—a case where the order sought to be set aside was an order giving leave to serve in France, and although they do, no doubt, show that the Court construed r. 8A as extending to foreign countries not within r. 8 they are not directed in any way to the point I have to consider, and where the expression "out of the jurisdiction" was used its application must, I think, be treated as limited to the class of case with which the Court had there to deal—that is, to cases where there was no question as to the country in which service was sought to be effected being other than a foreign country.

To the question which I have to ask myself: Is Scotland a foreign country within the rule? I cannot return any but a negative answer. The expression "foreign country" is not to be found in the Order until r. 8 is reached, and there, as I have already indicated, it is undoubtedly used in its ordinary and primary sense as referring to a state or country outside the King's dominions. In rr. 1, 3, 4 and 7 the expression used is "out of the jurisdiction," and I think it is impossible to read these four rules and rr. 8 and 8A without appreciating that a clear distinction is drawn in the Order between the two expressions. I think the words "foreign country" in r. 8A have precisely the same meaning as they have in r. 8, and that neither rule applies to Scotland or to any other part of the British dominions.

There was, therefore, in my opinion no jurisdiction to make the order giving leave to serve the summons in this matter

(1) [1910] 2 K. B. 735.

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on the applicant in Scotland, and I therefore discharge the order, with costs against the respondent.

Solicitors: *Stibbard, Gibson & Co.; Andrew, Wood, Purves & Sutton, for Hooper & Fletcher, Biggleswade.*

G. M.

EVE J. 1919 *July* 30.

In re BEECH.

SAINT *v.* BEECH.

[1919 B. 1149.]

Tenant for Life and Remainderman—Will—Conversion—Postponement—Unauthorized Investments—Valuation—Rate of Interest.

As between tenant for life and remaindermen interested under a will directing the conversion of residuary estate, with a power of postponement, the tenant for life will be entitled to interest at 4 per cent. upon the capital value, ascertained at the testator's death, of unauthorized income-producing investments.

The old rule to this effect laid down in *Meyer* v. *Simonsen* (1852) 5 De G. & Sm. 723 followed. The exceptions to it in *In re Woods* [1904] 2 Ch. 4 and *In re Chaytor* [1905] 1 Ch. 233, where 3 per cent. was allowed, discussed.

By his will, dated December 7, 1900, the testator, William Beech, appointed the plaintiff, Thomas Wakelin Saint, and his brother, the defendant, James Henry Beech, executors and trustees, and after bequeathing legacies to the amount of 6000*l.* bearing interest from his death at the various rates there mentioned, he devised and bequeathed all his real and personal estate to his trustees upon trust to sell, with fullest power and discretion to postpone the sale, and to invest the residue as therein mentioned, and he directed his trustees to set apart the sum of 5000*l.* out of his residuary trust estate or investments upon trust to pay the income to his brother, J. Beech, for life, and as to the remainder of his estate and after the death of his brother, J. Beech, as to the said sum of 5000*l.*, to stand possessed of the net income upon trust for his brother, James Henry Beech, for life, and after

his death upon the trusts therein mentioned for the benefit of Sophie Beech, wife of James Henry Beech, and their issue then living; and the testator authorized his trustees to determine whether any moneys were to be considered as capital or income. The testator died on May 4, 1911. The defendant, James Henry Beech, had four children living who were also defendants, the youngest being an infant. The largest part of the testator's estate consisted of his interest in a firm of woollen merchants, in which he was a partner. At his death a share of profits was due to him, and by virtue of the terms of article 30 of the articles of partnership, dated December 16, 1896, his interest in the firm became payable to the trustees of his estate by instalments of 1000*l.* a year, with interest at 5 per cent. on the unpaid balance. The total amount to be paid in accordance with the provisions of the articles was 21,128*l.* 14*s.* capital, and from 1911 the payments had been regularly made. At the date of the present application a sum of 6500*l.* was due. It was not until 1914 that all the pecuniary legacies were cleared off. Investments were made by the trustees to answer the sum of 5000*l.*, and 4 per cent. interest was paid on so much of the 5000*l.* as was not represented by proper securities. The defendant, J. H. Beech, was now entitled for life to the income of all the residuary property—namely, 8267*l.* 19*s.* 7*d.*—of which 6500*l.* was still owing by the firm. Part of the interest received from the firm had been capitalized. J. H. Beech desired that the whole of the 5 per cent. payable by the firm should be paid to him as tenant for life. The plaintiff took out an originating summons asking whether the trustees of the testator's will were justified in paying such interest to the tenant for life, or whether the defendant was only entitled to 3 per cent., or some other, and what, percentage, out of the interest actually paid by the partners of the testator upon the capital sum due.

A. Guest Mathews for the trustee.

Samuel Green for the tenant for life. I ask for interest

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at 4 per cent. to be allowed to the tenant for life upon the value of the unauthorized investment ascertained at the date of the testator's death. The rate of 4 per cent. was laid down as the proper amount in such circumstances in *Meyer* v. *Simonsen* (1), which was followed in *Wentworth* v. *Wentworth* (2) and *In re Owen.* (3)

C. G. Nicol for the remaindermen. Only 3 per cent. interest should be allowed according to the later decisions of *Rowlls* v. *Bebb* (4), *In re Woods* (5), and *In re Chaytor.* (6) The old rule allowing 4 per cent. has been reconsidered.

EVE J. Included in the residuary estate of the testator held upon trust for conversion with a discretionary power of postponement is a sum of 6500*l.* outstanding on an unauthorized security bearing interest at 5 per cent. The two first defendants are successive tenants for life of the residue with remainder to their children or issue.

It is common ground that the tenants for life are not entitled to the whole income coming in from the unauthorized investment, and that the same ought to be valued as at the date of the testator's death, and interest on the amount of the valuation so ascertained at some rate less than 5 per cent. be paid to the tenants for life. The question is whether such interest ought to be 3 or 4 per cent. For many years, and down to a comparatively recent date, the rate of interest allowed in similar circumstances to a tenant for life was 4 per cent. The rule is stated by Parker V.-C. in *Meyer* v. *Simonsen* (1), a case wherein the facts were almost identical with those of the present one. The Vice-Chancellor enumerated three distinct classes of cases in which this question arises, the third class being cases where property is so laid out as to be secure and to produce a large annual income, but is not capable of immediate conversion without loss and damage to the estate; and after stating that the particular case before him fell within this class, he added that the usual rule was

(1) 5 De G. & Sm. 723.
(2) [1900] A. C. 163.
(3) [1912] 1 Ch. 519.
(4) [1900] 2 Ch. 107.
(5) [1904] 2 Ch. 4.
(6) [1905] 1 Ch. 233.

not to convert the property, but to set a value upon it and give the tenant for life 4 per cent. upon such value. The existence of the rule was recognized in *Wentworth* v. *Wentworth* (1), where Lord Macnaghten said: "In this country, in the case of income-producing property directed by will to be converted, but retained for a time unconverted for the benefit of the estate, it has been the practice of the Court to put a value on the property, and to allow the tenant for life out of the income actually produced a sum equal to 4 per cent. on such value. That was the rule laid down by Parker V.-C. in *Meyer* v. *Simonsen* (2) and followed by Lord Cairns in *Brown* v. *Gellatly*." (3)

The late Neville J. in *In Re Owen* (4) stated the rule in these words: "The question depends upon the conventional rule which has been adopted by the Court in cases where a testator has disposed of his property upon trust for sale with a discretionary power to postpone the conversion of all or any part of the estate, and has given his property to a tenant for life with remainder over, but has not provided that until the sale the tenant for life shall have the benefit of the actual income produced by the unauthorized securities which, under the discretion to postpone, the trustees may have retained. The Court in such a case has adopted a rule of taking the estimated capital value of the unauthorized securities at the death of the testator and allowing to the tenant for life 4 per cent. interest upon the estimated amount, and directing that in regard to the surplus income arising out of the unauthorized investments there should be accumulation and capitalization of that income." But there are to be found in the books some exceptions to the rule so far as it fixes 4 per cent. as the rate of interest. I do not think the decision in *Rowlls* v. *Bebb* (5) really applies to this case, because it must be noted that in that case the unauthorized investment was a reversion producing no income; and in these circumstances, sufficient in themselves to remove the case from

(1) [1900] A. C. 163, 171.
(2) 5 De G. & Sm. 723.
(3) (1867) L. R. 2 Ch. 751.
(4) [1912] 1 Ch. 519, 523.
(5) [1900] 2 Ch. 107.

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the third class of case referred to by Parker V.-C., it may well be that the Court would think 3 per cent. on the value of the reversion an adequate allowance to the life tenant. But there are two other exceptions to which I am bound to refer. In *In re Woods* (1) Kekewich J. allowed only 3 per cent. interest, and in so doing he expressly took into consideration two factors, the one that the securities were of a wasting nature, and the other that the value of money had then materially altered since the date when 4 per cent. had been fixed as the correct rate. In 1905, in *In re Chaytor* (2), Warrington J. not only followed what had been done in *In re Woods* (1) as to unauthorized securities of a wasting nature, but fixed 3 per cent. as the interest to be paid on the value of all unauthorized securities, whether wasting or not. There can be no doubt that in 1904 and 1905 the income derivable from trust securities was very much less than it had been in the days when *Meyer* v. *Simonsen* (3) was decided, but subsequent experience perhaps provokes the observation that a departure from a salutary rule in matters of this kind —introducing as it does an element of uncertainty in practice and administration—can only be justified if the changed conditions on which it is founded continue at least as constant as those upon which the rule was itself framed. Had the value of money remained till to-day the same as it was in 1904 and 1905 I might have felt myself constrained to follow these last two cases, and to hold that as between tenant for life and remainderman 3 per cent., and not 4 per cent., was now the proper rate of interest. But the conditions have materially changed since 1904 and 1905, and at the present date, when first-class investments can be obtained for trust moneys yielding interest at 5 per cent., matters approach much more near to the condition of things subsisting when *Meyer* v. *Simonsen* (3) was decided than to those obtaining when *In re Woods* (1) and *In re Chaytor* (2) introduced exceptions to the rule laid down in the earlier case, and on these grounds I think much of the reasoning on which these later decisions were based has no application to-day.

(1) [1904] 2 Ch. 4. (2) [1905] 1 Ch. 233.
(3) 5 De G. & Sm. 723.

In my opinion, in view of the present financial position, it is time to revert to the old rule, and to hold that as between tenant for life and remainderman the tenant for life is entitled to 4 per cent. interest on the value of unauthorized securities, so far as they are income-producing securities. That is sufficient to decide on this occasion, because the security with which I have to deal is one producing an income in excess of the interest I am allowing to the tenant for life. I say nothing as to what ought to be done in cases where the unauthorized security is a reversion or other property producing no interest. The proper rate of interest in this case is, in my opinion, 4 per cent., and I do not think there is any authority which binds me, in the existing state of the money market, to reduce it to 3 per cent. I propose to declare that the tenant for life is entitled to be allowed, out of the income actually produced by the 6500*l.*, interest at the rate of 4 per cent. per annum on the value of the investment at the date of the testator's death, and from that date.

Solicitors for all parties: *H. B. Wedlake, Saint & Co.*

G. M.

WALL *v.* LONDON AND PROVINCIAL TRUST, LIMITED.

[1919 W. 737.]

Company — Redemption of Debenture Stock under Par — Profit on the Transaction—Capital or Dividend.

The defendant company was incorporated in 1900 as a trust investment company of the type described in *Verner* v. *General and Commercial Investment Trust* [1894], 2 Ch., 239, the objects as defined by clause 3 of its memorandum of association including (*a*) to acquire and hold stocks, shares and securities of the classes therein specified and from time to time to change such investments for others of the like nature, and (*b*) to borrow on debenture stock and to redeem or pay off any moneys so borrowed. The business and accounts of the company were conducted and kept on the footing that profit or loss on a change of investment was carried to capital account and net receipts over expenditure were carried to revenue account and became available for payment of dividends without regard to any depreciation in the market value of the investments. In 1900 the company issued at par 50,000*l.* 4½ per cent. debenture stock. In 1918, owing to the general fall in the value of securities, the directors

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were enabled to redeem some 29,312*l.* of this debenture stock at a discount of 22 per cent., and now claimed the right to carry the whole amount of this discount to revenue account. It was admitted that the securities held by the company had fallen to an extent approximately equivalent to the discount at which the debenture stock had been redeemed :—

Held, that clause 3 (*b*) of the memorandum of association did not authorize a separate and independent business, but was subsidiary to the main purpose in clause 3 (*a*) ; that the amount of the discount at which the debenture stock had been redeemed was not net profit of the company nor net profit arising from its business, and that no part thereof could be distributed as dividend.

MOTION.

The defendant company was incorporated under the Companies Acts in the year 1900. Its objects as defined by clause 3 of its memorandum of association included (*a*) to acquire and hold any bonds, shares, stocks, debentures or debenture stock, or other securities of the classes therein specified, and from time to time to change such investments for others of the like nature ; (*b*) to borrow or raise, or secure the payment of money in such manner as the company shall think fit, and in particular by the issue of any bonds, mortgages, debentures or debenture stock of the company, perpetual or otherwise, charged upon all or any part of the company's property, both present and future, including its uncalled capital and unpaid calls, and to redeem or pay off any moneys so borrowed, raised or secured.

The issued capital of the company consisted of 67,992*l.* ordinary stock and an equal amount of preference stock bearing a preferential dividend of 4½*l.* per cent.

The articles of association provided :—

123. "The board may, with the sanction of the company, in general meeting from time to time declare a dividend to be paid to the members in accordance with their respective rights and interests in the profits."

124. "The board may in any year after a dividend of 4½ per cent. has been paid on the preference stock and 4 per cent. on the ordinary stock carry to a general reserve account for the equalisation of dividends or payment of losses such sum as they may deem expedient."

125. "No dividend, instalment of dividend, or bonus shall be payable except out of net profits arising out of the business of the company."

126. "All profits and losses resulting from any change of investment shall be carried to capital reserve account, and any such profits or losses shall be disregarded in estimating the net profits of the company. Provided, however, that on any investment which has been purchased and resold at a profit, and which has yielded a return of income not exceeding 5 per cent. per annum, the board may appropriate for revenue out of such profit such a sum or sums as will make a return on such investment equal to interest at the rate of 5 per cent. per annum."

In 1900 the company issued 50,000*l.* 4¼ per cent. debenture stock redeemable at the option of the company at 115*l.* per cent., but by agreement between the company and any of the stockholders the whole or any part of the stock might be paid off on any other terms. In 1918 the market value of the debenture stock stood at about 78*l.* per cent., and, taking advantage of this fact, the directors entered into negotiations which enabled them to redeem some 29,312*l.* worth of the stock at a discount of 22*l.* per cent. This discount amounting to some 6225*l.* the company carried to a so-called revenue reserve account, and claimed the right, if so minded, to bring all or any part thereof into current revenue as an item of net profit of its business for distribution as dividends; and the plaintiff, on behalf of himself and all other holders of preference stock, brought this action to restrain the company and its directors from so doing, and now moved for an interlocutory injunction.

Nathaniel Spens, the chairman of the defendant company, filed an affidavit on the motion in which he deposed (para. 1) that he was chairman or director of five other investment trust companies whose business was conducted on similar lines to the business of the defendant company with similar conditions necessitating the capital and revenue accounts being separate and continued:—

3. "The business of such investment trust companies

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is to receive and invest capital in the types of investments specified in their respective memoranda and articles of association and to hold such investments with a view to receiving the dividends from such investments which dividends are carried to the credit of revenue account and normally form the main portion of earnings of the trust companies from which dividends can be declared for their own shareholders."

4. "Power is taken by such trust companies to change such capital investments from time to time, but unlike some finance companies whose business is to make profit by constantly turning over their capital investments, in the case of investment trust companies it is usual in their articles to provide, as has been done by article 126 of the defendant company, that any profit and loss made by a change of investment is not to be carried to revenue account but to capital reserve account. This provision was inserted at a time in the history of investment trust companies when in the absence of some regulation it was doubtful whether dividends could still be paid on the share capital when the current monetary values of the investments did not agree with their book values and when such a contention if upheld would have destroyed the real objects of such investment trust companies."

5. "Investment trust companies are also usually empowered to raise and receive funds on debentures or deposits to deal with such borrowed moneys, to redeem such debentures and pay off such borrowed moneys as and when it may be advisable and profitable for them so to do, and they expect, like bankers with deposits, to derive benefit therefrom." . . . .

7. "The revenue account of such companies therefore consists on the credit side of :—

"(*a*) Dividends or capital investments.

"(*b*) Fees in respect of trusteeships or for guarantees ;

"(*c*) Other receipts from their business, not being profits on changes of investments.

"And the debit side consists of :—

"(*a*) Expenses of management.

"(*b*) Interest on deposits or other borrowed moneys.

"The results to the company depend upon the maintenance

of the credit side of the account at the highest amount possible consistent with safe investment of its funds, a moderate rate of management expenses, and a satisfactory result of its dealings with its deposits or loans on debentures or issue of annuities, which is the real meaning of debenture stock."

8. "On the lines above explained the defendant company's business has been conducted since its incorporation and at the last balance sheet prior to the war the result was a dividend of 4½ per cent. was earned and paid on both preference and ordinary capital, a capital reserve account had been formed in accordance with article 126, and a balance derived from the balance of profits over losses on realisation of investments of the defendant company amounting to 15,675*l.* 8*s.* 11*d.* stood to the credit of such capital reserve account."

Paras. 9, 10 and 11 dealt with the redemption of the debenture stock.

12. "In order to carry out the redemption of this stock the defendant company either paid the holders of the stock from time to time being redeemed, in cash or by transferring to them investments of the defendant company at their market value, and any loss on the realisation of investments to provide the cash or the difference between the value of the investments in the books of the defendant company and the market value at which they were transferred to the redeemed debenture stock holders was charged against the capital reserve account as the directors held they were bound to do under article 126 of the defendant company.

"Similarly, if any profits were made by the sale of investments to provide cash or the transfer of investments for the purpose of redeeming debenture stock holders, such profit must be charged to capital reserve account. But the profit arising on the sale of an investment is entirely distinct and separate from the profit arising from the fact that the defendant company has been able to pay off part of its debenture stock at a discount."

13. "How the profit arising from being able to pay off part of its debts at a discount should be dealt with, the board most carefully considered, and eventually after several

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consultations with their auditors in 1917 it was decided that the only proper means of dealing with it was to place it to revenue reserve account under article 124. . . ."

15. "The defendants submit that the sums in question realised by redeeming debenture stock at a discount are not profits arising from any change of investment within the meaning of article 126 of the defendant company but are the results of a profitable adjustment of the defendant company's indebtedness carried out by the board of the defendant company in the ordinary course of its business which have enabled it to a certain extent to neutralise deficiencies of revenue caused by the temporary diminution owing to the war of payment of dividends on some of its investments and from the higher rates now prevailing for temporary borrowed money which tends to curtail its business. And they submit that the amounts realised by so redeeming these debts at a discount could subject to the deductions for management expenses and interest on borrowed moneys still unredeemed have properly been treated as net profits available for distribution as dividends. But at their discretion in view of the unsettled conditions arising from the war they preferred, in accordance with article 124, to carry them to revenue reserve account and the defendants submit that in so doing and in treating them as available for the equalisation of dividends they were not only justified but bound by the articles of association of the defendant company so to act."

The auditors' note to the last balance sheet stated: "The investments are as usual stated at cost in the balance sheet. Owing to the conditions prevailing no valuation has been made, and it is therefore not possible to determine the amount of depreciation subsisting."

Gover K.C. and *Swords* for the plaintiff. The amount of the discount at which the debenture stock has been redeemed is neither net profit arising from the business of the company nor is it profit at all. See per Farwell L.J. in *In re Spanish Prospecting Co.* (1) distinguishing between profits arising from

(1) [1911] 1 Ch. 92, 106.

the business and profits of the company. The business of the company is that of investing, not that of trafficking, in stocks, shares and securities, and the power to borrow on debenture stock was subsidiary to that business: *Verner* v. *General and Commercial Investment Trust* (1); *Ammonia Soda Co.* v. *Chamberlain.* (2)

The mere diminution of liability does not create a profit to the company any more than the appreciation of any particular item of investment.

To enable this sum to be dealt with as profits it would be necessary to have the whole of the assets valued: *Lubbock* v. *British Bank of South America* (3); *Foster* v. *New Trinidad Lake Asphalt Co.* (4); *Bolton* v. *Natal Land and Colonization Co.* (5), and it is admitted that no such valuation has been made, and that, if it were, it would show a heavy depreciation.

Clauson K.C. and *Spens* for the defendants. The whole amount of the discount is available for dividend if the company so please. Clause 3 (*b*) of the memorandum of association is a separate and independent clause authorizing a separate business which has resulted in a profit on the particular transaction equal to the amount of the discount. Moreover even on the footing of *Verner* v. *General and Commercial Investment Trust* (1), the amount of the discount represents the sum withdrawn from revenue in payment of interest on the debenture stock. To treat it as available for dividend is only restoring to revenue what revenue has previously provided. Article 126 supplies the measure of the company's obligations in respect of capital account and on that footing no revaluation of the company's assets is necessary.

Gover K.C. in reply. The power of borrowing in clause 3 (*b*) of the memorandum of association is ancillary only to the main objects of the company and does not authorize a separate and independent business.

Cur. adv. vult.

(1) [1894] 2 Ch. 239.
(2) [1918] 1 Ch. 266.
(3) [1892] 2 Ch. 198.
(4) [1901] 1 Ch. 208.
(5) [1892] 2 Ch. 124.

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June 6. YOUNGER J. delivered the following written judgment:—This is a motion by the plaintiff on behalf of himself and all other the holders of preference stock in the defendant company for an injunction to restrain the company and its directors from distributing by way of dividend to the stockholders of the defendant company and particularly to the deferred stockholders thereof the sum of 850*l.* or any other sum or sums alleged by the defendants to be profits on redemption of debenture stock of the defendant company.

That company was incorporated in the year 1900. It is, as its name implies or imports, an investment trust company. Its main purpose is to receive and invest capital in the particular range of investments set forth in para. 3 (*a*) of its memorandum of association and to hold such investments as varied from time to time with a view out of the dividends or other periodical produce thereof to provide for the interest on the borrowed money and for the dividends on the shares or stock of the company out of the proceeds of which the investments were acquired.

The company is typical of the class described in *Verner* v. *General and Commercial Investment Trust.* (1) Its accounts are kept on the double account system. Profit or loss on a change of investment is not carried to revenue account. The company is not by its constitution entitled to divide for the purpose of dividend any increase in the value of its investments however great: it is not on the other hand precluded from paying a dividend out of the excess of current receipts over expenditure however serious in amount even the ascertained depreciation of its assets may be. This company in 1900 made an issue of 50,000*l.* of 4½ per cent. debenture stock. The stock was issued at par; its nominal amount was repayable by the company in the events specified in the trust deed securing it, and it was redeemable at the option of the company on notice at 115 per cent. By agreement however between the company and any of the stockholders the whole or any part of the stock might be paid off on any other terms than those prescribed in the trust deed.

(1) [1894] 2 Ch. 239.

In the year 1918 the market value of the stock stood at about 78 per cent. Taking advantage of this fact—accounted for by the general increase in the current rate of interest occasioned by the war and not by any adverse fortune of the company—the directors entered into negotiations which have resulted in their being able to redeem 29,312*l.* worth of stock at a discount of 6225*l.* below its nominal amount. These sums are sufficiently accurate ; there is, however, in the evidence some slight discrepancy in figures of detail. This discount, which, as a matter of book-keeping—and the item has never been more than a paper entry—the company has carried to a so-called revenue reserve account, it claims the right, if so minded, to bring into current revenue as an item of net profit of its business available under arts. 123 and 125 for distribution as dividend, and the sum of 850*l.* referred to in the notice of motion is the part of it which, as the plaintiff alleges, the company now threatens and intends so to distribute amongst its ordinary stockholders. It is not disputed that to the extent of a smaller sum the company does so intend and the question is whether it can legally make the distribution. I am told that, in view of the present monetary situation and the opportunity which that situation offers for similar transactions on a large scale, the question will frequently arise in practice in the immediate future in relation to trust companies. It, accordingly, demands careful consideration.

As raised in the present case the problem is not affected by any circumstances peculiar to this company. While no evidence on the subject has been tendered, it is not contended by the company that the investments originally purchased by it with the proceeds of the redeemed stock can be shown to have retained their original value. The defendants are content to assume that these investments may have fallen to an extent approximately equivalent to the discount at which the stock has been redeemed. They make that assumption because the fact, if it be a fact, is, they say, irrelevant. And it is, I think, necessary to their case that it should be. But is it irrelevant ?

Mr. Clauson contended that it was, mainly as I understood

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him, on two grounds. The first was that in the memorandum of association of this company there is in clause 3 (*b*) included amongst its objects this. [His Lordship read it and continued:] This clause Mr. Clauson said did not merely confer upon the company a power exercisable for the attainment of the company's main purpose as above described. It authorized, he urged, a separate business which in the present case had resulted in a profit measured roughly by the discount. In that view it was quite unnecessary to embark on the possibly impossible task of ascertaining what had happened to the money originally paid to the company in respect of the stock now redeemed. The partial extinction of the company's original liability to repay the full amount was, he said, all that need be regarded. The argument, if I have fully appreciated it, is in my view quite inadmissible. First of all this clause in the memorandum is I think a mere subsidiary power, and is not an independent purpose or object of the company. But, if it were so, it would still in my judgment be impossible to affirm that such a transaction as the present had resulted in a profit to the company unless it were at the same time established that there remained in the hands of the company in respect of it an asset equivalent in value to the profit alleged. If, for example, the whole 50,000*l.* raised by this issue of debenture stock had been lost by the company the day after its receipt, the company, if the stockholders accepted 10,000*l.* in respect of their claim for repayment, would not have made a profit of 40,000*l.* on the transaction as the argument seems to affirm: the company would in fact have made a loss of 10,000*l.*

But Mr. Clauson's second suggestion was that this discount really represented the sum that had been withdrawn from revenue in payment of interest on the stock, over and above what would have been really exigible in respect of interest upon it, if from the year 1900 when the stock was issued the money had been held by the company at call. To treat the discount as profit was, on this view, only a restoration to revenue of a sum which revenue had previously provided. But in my view this transaction did not for its terms depend in any way upon the previous duration of the loan, long or

short, or upon the amount of interest paid in respect of it. It depended substantially, if not entirely, upon considerations arising from the general monetary situation of the country at the time and was not affected in its terms by any question as to the date of the advance. The redemption price was determined by present and future considerations; and, so far as I can see, by no others. Moreover I cannot myself appreciate how a redemption by agreement in 1918 could retrospectively convert that which was throughout its course a permanent loan into an advance of money at call, altering its incidents accordingly.

And Mr. Spens sought to justify the company's claim on another ground. He referred to art. 126 which is as follows. [His Lordship read it and continued:] That article Mr. Spens said was the measure of the company's obligation in respect of capital account: if it did what was there required, it did all that it was bound to do and it might apply as dividend any sum, even a sum taken from capital itself, if that sum did not represent such a profit or loss as is mentioned in the article and if it was no longer countered by a continuing obligation of the company on the other side of the capital account. In other words Mr. Spens' argument, as I understood it, was that in such a company as this not only may you distribute as profit any balance of revenue irrespective of capital depreciation, but, if you cancel any capital liability, you may withdraw from capital assets and credit to revenue the equivalent amount in real value so released, and that without troubling to ascertain by valuation or in any other way whether your remaining capital assets have maintained the value attributed to them or not.

Again I must say that the argument, if I understand it aright, is, in my judgment, quite inadmissible. It is true, as I have said, that in the case of such a company as we have here capital and revenue accounts are distinct accounts and you may operate upon a credit balance on the second account irrespective of loss on the first. But the accounts are distinct. There is a gulf set between them not spanned by any bridge. You must not carry any asset from one to the other. The price

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of being entitled to distribute as dividend a revenue balance regardless of a capital loss is that you may not supplement a deficiency of revenue by carrying to the credit of that account a gain on capital however realized. As was said in the case of *Bolton* v. *Natal Land and Colonization Co.* (1): "It was an erroneous method of estimating their profits to have brought in as part of the profits of the year an increase, or nominal increase, of the value of their property in Africa." And this statement in respect of companies adopting the double account system is, I think, of universal application. In other words, the transfer from the one account to the other is inadmissible in the case of such companies even if after transfer made the real as distinct from the mere book-keeping equilibrium of the capital account is not thereby disturbed. A fortiori and for reasons far more cogent than any considerations of accountancy no such transfer can be made as it is here sought to make it regardless altogether of that equilibrium —regardless, in other words, of the true value of the remaining capital assets of the company.

The truth is that in accounts kept as this company is required to keep its accounts an appreciation in capital assets can never increase the dividend fund. If for the purpose of dividend a company like this desires to gain the benefit of an appreciation in capital values it must adopt the single account system and, as a consequence, value its entire assets for the purpose of every dividend distribution. That is not in accordance with the constitution of this company as it stands, and the present value of its assets offers no inducement to effect any immediate change in that direction.

In my judgment therefore this discount is in no sense either net profit of the company or net profit arising from its business. The company is not in my judgment entitled to distribute any part of it, as such, in dividend, and the motion, therefore, in substance succeeds.

Solicitors for plaintiff: *Evans, Jarvis & Sherry.*

Solicitors for defendants: *Baker, Blaker & Hawes.*

(1) [1892] 2 Ch. 124, 133.

A. C.

WHEELER *v.* KEEBLE (1914), LIMITED.

YOUNGER J.

1919

June 20, 27; *July* 4, 5.

[1919. W. 986.]

Practice—Cause of Action—Lease—Recovery of Possession—Breach of Covenant—Interlocutory Injunction—Damages—Costs of Motion.

The plaintiffs by their writ claimed (1.) possession of premises comprised in a lease; (2.) damages for breach of covenants contained in the lease; and (3.) an interim injunction; and served a notice of motion for an injunction to restrain the defendants from erecting or permitting to remain erected certain lettering then erected on the front of the premises in breach of the covenants contained in the lease. The breach of covenant by the defendant responsible for the breach was admitted, but since the notice of motion was served the breach of covenant had been remedied:—

Held, that the issue of the writ to recover possession was an unequivocal determination of the lease on the part of the plaintiffs and that it was not open to them to move for an injunction on the footing that the lease was still subsisting, and that the plaintiffs must pay the costs of the motion.

Jones v. *Carter* (1846) 15 M. & W. 718 followed.

Read v. *Wotton* [1893] 2 Ch. 171 dissented from.

MOTION.

The plaintiffs were the lessees of No. 447, Oxford Street, for a term of seventy-two years from September 29, 1876, under a lease dated November 22, 1878, granted by the Duke of Westminster at a yearly rent and subject to covenants by the lessees (inter alia) . . . . (*b*) not without the previous consent of the landlord for the time being to allow upon any part of the said premises above the ground floor any show of any trade whatsoever; and (*c*) not to make any alteration in the external construction, height, elevation, or architectural appearance of the said demised premises . . . . with a usual proviso for re-entry on breach of the covenants therein contained.

By an underlease dated January 23, 1909, and made between the plaintiffs of the one part and Keeble, Ld., of the other part the said premises were demised to Keeble, Ld., for the term of twenty-three years from September 29, 1908, at an enhanced rent, and subject to covenants by the lessees

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(inter alia) . . . . (clause 9) not, without the previous consent of the lessors and the superior landlord for the time being for the following purposes respectively, to make or permit to be made upon any part of the said demised messuage or building above the ground floor any show of any trade or business whatsoever; and (clause 11) not to make or permit to be made any alterations in the external construction, height, elevation or architectural appearance of the said demised premises, without the previous written consent of the lessors and the superior landlord for the time being for those purposes respectively, with a usual proviso for re-entry on breach of the covenants therein contained. This underlease was assigned to and was now vested in the defendant Keeble (1914), Ld.

On November 8, 1918, Keeble (1914), Ld., sub-demised the first, second and third floors of the said premises to Hitchings, Ld., for the term of thirteen years from September 29, 1918, at an enhanced rent and subject to similar restrictive covenants to those contained in the underlease of January 23, 1909.

In October, 1918, application was made on behalf of Keeble (1914), Ld., and Hitchings, Ld., for a licence to the latter to erect on the front of the said premises large letters forming the words "Hitchings, Limited," above the second floor windows, the words "Baby Car Manufacturers" above the first floor windows, and the words "Hitchings, Limited," above the ground floor windows, and a licence was granted by the ground landlords and the plaintiffs accordingly, but on the express terms that the lettering above the second floor windows was omitted.

Notwithstanding the terms of this licence, in or about November, 1919, Hitchings, Ld., in addition to the other lettering, placed the words "Hitchings, Limited," in large letters above the second floor windows.

On March 10, 1919, Hitchings, Ld., sub-demised the same three floors to the Marchioness of Londonderry for the said term of thirteen years (less the last three days) for use in connection with the Women's Legion Domestic Service

Section, and the Marchioness thereby covenanted not to place on the said premises any trade sign or name, except (subject to the licence of the superior landlord being obtained by the lessee at her own expense) a hanging sign with the words "Women's Legion, Household Service Section" upon it. At the time when this sub-demise was granted, the Marchioness was informed by Hitchings, Ld., that there would be no objection to a temporary signboard of this nature being attached to the outside of the premises, and the signboard was attached accordingly.

In April, 1919, the ground landlord's attention having been called to the lettering erected above the second floor windows, his solicitors wrote to the plaintiff's solicitors to have it removed. The plaintiff's solicitors wrote to the solicitors of Keeble (1914), Ld., to the same effect, and complaining also of the signboard of the Women's Legion Household Service Headquarters, and also wrote to the solicitors of Hitchings, Ld., requiring the offending lettering and signboard to be immediately removed. Considerable correspondence between the solicitors of the several parties ensued, and on April 29, 1919, the plaintiffs gave formal notice in writing, under the Conveyancing Act, to Keeble (1914), Ld., and Hitchings, Ld., to remedy the alleged breaches of covenant contained in the underlease of January 23, 1909, and make compensation. A notice was also served on the Marchioness of Londonderry on May 7.

On May 13, the solicitors of Hitchings, Ld., wrote to the plaintiff's solicitors undertaking to have the offending lettering removed, and on May 17, so far as the Marchioness was concerned, the freeholders gave their sanction to the signboard of the Women's Legion Household Service. Nothing further however was done, and on May 27 the plaintiff's solicitors wrote to the solicitors of Hitchings, Ld., stating that their patience was getting exhausted, and that unless their requirements were at once carried out they should take steps to enforce their client's rights, and that letter remaining unanswered, the writ in this action was issued on June 5, 1919, by the plaintiffs against Keeble (1914), Ld., Hitchings,

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Ld., and the Marchioness of Londonderry as defendants, claiming: (1.) Possession of the said premises comprised in the said lease of January 23, 1909; (2.) damages for breach of covenants contained in the said lease; (3.) an interim injunction; and (4.) costs.

By a notice of motion served by leave with the writ, the plaintiffs asked for an injunction to restrain the defendants from erecting or permitting to remain erected upon the external front of the said premises the name, lettering or advertisement then erected thereupon [following the terms of the covenants in the said lease of January 23, 1909] and from in any other manner whatsoever committing any breach of the covenants mentioned in the said lease.

The offending lettering and also the signboard had been removed shortly after the service of the notice of motion, which now came on to be heard on the question of costs.

No leave had been obtained by the plaintiffs under Order XVIII., r. 2, to join the claim for an injunction with the claim for the recovery of the premises, but the defendants had filed affidavits and taken steps in the action since the issue of the writ.

The Court on the hearing of the motion decided that there had not been any breach of covenant for which Keeble (1914), Ld., was responsible; and that as regards the Marchioness of Londonderry there had not been any breach of covenant on her part, and dismissed the motion with costs as against these two defendants.

Clauson K.C. and *Roope Reeve* for the plaintiffs. The plaintiffs are entitled to the costs of the motion.

No leave of the Court was necessary to join the claim for an interim injunction with the claim for possession under Order XVIII., r. 2, the injunction being ancillary only: *Read* v. *Wotton* (1); *Kendrick* v. *Roberts* (2); *Gledhill* v. *Hunter*. (3) Moreover since the issue of the writ the defendants have filed affidavits which would cure any irregularity in the issue

(1) [1893] 2 Ch. 171. (2) (1882) 30 W. R. 365.
(3) (1880) 14 Ch. D. 492.

of the writ without leave. See Order LXX., r. 2. *Jones* v. *Carter* (1) is no doubt an authority at law that by issuing and serving a writ in ejectment, the claimant elects to treat the defendant as trespassers, and that he cannot sue them as tenants subsequently to the issue of the writ; but the decision of Stirling J. in *Read* v. *Wotton* (2) shows that an interlocutory injunction, being a mere substitute for the damages which might be assessed under Order XXXVI., r. 58, for the continuing breach between the issue of the writ and the trial of the action, is not inconsistent with the claim for possession. Moreover the breach of covenant here was complete before the issue of the writ, and the injunction can be properly granted in respect of an injury complete before the determination of the lease. [They also referred to *Grimwood* v. *Moss* (3); *Evans* v. *Davis* (4); *Moore* v. *Ullcoats Mining Co.* (5); *Howard* v. *Fanshawe* (6); *Dendy* v. *Evans*. (7)].

H. Terrell K.C. and *Harman* for Hitchings, Ld. The claim for an injunction is inconsistent with the claim for possession. The issue of the writ was a clear unequivocal act by the plaintiffs to determine the lease and put an end to the covenants contained in the lease and the right to any injunction based on those covenants: *Birch* v. *Wright* (8); *Jones* v. *Carter* (1); *Moore* v. *Ullcoats Mining Co.* (5)

The plaintiffs can only claim an injunction in aid of relief claimed by the action at the trial, and the two claims in the present case are inconsistent with one another: *Lumley* v. *Ravenscroft.* (9)

Read v. *Wotton* (2) is distinguishable. That was a case of serious nuisance, and although Stirling J. treated it as a breach of the covenant contained in the lease the injunction could have been supported as a case of nuisance simply, and so far as the decision was based on breach of covenant it is inconsistent with the law stated by Parke B. in *Jones* v. *Carter* (1) and by Warrington J. in *Moore* v. *Ullcoats Mining*

(1) 15 M. & W. 718.
(2) [1893] 2 Ch. 171.
(3) (1872) L. R. 7 C. P. 360.
(4) (1878) 10 Ch. D. 747, 763.
(5) [1908] 1 Ch. 575.
(6) [1895] 2 Ch. 581.
(7) [1910] 1 K. B. 263.
(8) (1786) 1 T. R. 378.
(9) [1895] 1 Q. B. 683.

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Co. (1) and with the earlier decision of Stirling J. himself in *Hambling* v. *Wallani.* (2)

It is said that the injury was complete before the issue of the writ and therefore before the determination of the lease, but if the breach of covenant was a continuing breach at the issue of the writ it ceased to be such by the destruction of the covenant, and if it was not a continuing breach, then there is no case for an injunction.

J. I. Stirling for Keeble (1914), Ld.

Wilfrid Greene for the Marchioness of Londonderry.

Clauson K.C. in reply. The motion can in any case be supported as an interlocutory motion for possession.

YOUNGER J. stated the facts and read the writ of summons and notice of motion, and said that as regarded Hitchings, Ld., there had been an admitted breach of covenant in respect of the lettering above the second floor windows, and continued: I have therefore now to consider on strict and technical grounds whether in respect of this admitted breach the plaintiffs are entitled to any relief at all on this motion. That depends, in the first place, upon the nature of the writ; and, in my opinion, there can be no question that the writ on its true construction amounts to an unqualified election on the part of the plaintiffs to determine the lease. All the relief claimed by the writ subsequent to the claim for possession is subsidiary to that relief and claim for possession. And it is in an action so framed that the present notice of motion has been served. That notice of motion however is not based upon any right of property which, if the lease is set aside, reverts to the plaintiffs, but is based entirely upon the lease itself, and is served in an action which presupposes that the lease has determined: it asks in terms that the defendants be restrained by injunction from committing a breach of the covenants contained in the lease which in my opinion on the true construction of the writ has been determined by its issue.

Now in my judgment that procedure on the part of

(1) [1908] 1 Ch. 575. (2) [1889] W. N. 133.

the plaintiffs is not permissible. The actual point was decided as long ago as the year 1846, if not long before that date, in *Jones* v. *Carter* (1), and I will do no more than read the following words of Parke B., who then delivered the judgment of the Court: "Without inquiring whether an ejectment be a real action, the bringing of which and the counting in which would, according to the authority of Lord Coke, be a determination of an election between two remedies, it seems to us that so distinct and unequivocal an act must, independently of any technical reason, be a final determination of the landlord's option; for after such an act, by which the lessor treats the lessee as a trespasser, the lessee would know that he was no longer to consider himself as holding under the lease, and bound to perform the covenants contained in it; and it would be unjust to permit the landlord again to change his mind, and hold the tenant responsible for the breach of duty, after that time." *Birch* v. *Wright* (2), which was referred to in that case, is also a very apt authority to the same effect. In delivering his judgment Ashhurst J. said: "It is very material to distinguish the different dates and times. From April 6, 1785"—the day of the demise—"to the time of recovering in the action of ejectment, in my opinion the plaintiff is precluded from recovering in this form of action; for"—and this is the exact point—"that would be blowing both hot and cold at the same time, by treating the possession of the defendant as that of a trespasser, and that of a lawful tenant, during the same period." It seems to me that no change has been made by subsequent procedure in the principles which are laid down in these two cases, and that accordingly it is not permissible for the plaintiffs in this action—based as it is on the determination of the lease—either in the writ itself or in any proceedings subsequent to the writ to claim relief on the footing that the lease is a subsisting lease, the terms of which continue to be binding on the defendants. In my opinion therefore the plaintiffs are not entitled to obtain the injunction which they ask by simply referring to

(1) 15 M. & W. 718, 726. (2) 1 T. R. 379.

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the terms of the lease. If they are entitled to an injunction at all it must be apart from the terms of the lease and solely in respect of their own interest in the premises and of some irreparable injury which may be sustained by them through the acts of the defendants on the plaintiffs' own property in case those acts are allowed to continue.

If that be the true point of view from which to approach the question of the liability of the defendants on this motion, the principles on which the Court acts are clearly stated by Kindersley V.-C. in *Lowndes* v. *Bettle* (1), and will be found in the headnote to the report, which is as follows : " Where a defendant is in possession of an estate and a plaintiff claiming possession of it seeks to restrain him,"—in that case it was from cutting down trees and digging sods and other such like acts—" the Court will not interfere, unless the acts complained of amount to such flagrant instances of spoliation as to justify the Court in departing from the general rule. Where a plaintiff is in possession and the person doing the acts complained of is an utter stranger, not claiming under colour of right, then the tendency of the Court is *not* to grant an injunction, unless there are special circumstances, but to leave the plaintiff to his remedy at law ; though if the acts tend to the destruction of the inheritance, the Court will grant an injunction." Now, here I find no evidence that the Westminster Estate is threatening to forfeit the plaintiffs' lease, or to do anything of that kind, and apart from any such action on their part it is not contended that the acts of the defendants in relation to these premises were serious to anybody else. Accordingly it appears to me that, subject to one authority to which I shall refer in a moment, in principle this motion is misconceived by reason of the fact that the action being based upon the footing that the lease has determined an injunction to enforce the covenants in that lease can no longer be asked for or obtained. But then it was said by Mr. Roope Reeve, and it is a point that deserves careful consideration, that the breach complained of was complete before the writ was

(1) (1864) 33 L. J. (Ch.) 451.

issued and before the lease had been determined, and that accordingly the Court can be properly asked to grant an injunction in respect of an injury which was complete before. I think, however, that the answer which Mr. Terrell gave to that contention was the true one. He said that this breach either was or was not a continuing breach. If it was a continuing breach, it ceased to be a breach by the destruction of the covenant. If, on the other hand, it was not a continuing breach, then there is no case for an injunction. From that point of view, therefore, an injunction cannot in my opinion be granted notwithstanding that the breach was complete before the writ was issued.

But then it is said by Mr. Clauson—and this is a very serious point, because I am confronted with a decision of Stirling J. which I need hardly say commands my deepest respect—that he is entitled to this injunction on the ground that at the trial he will claim damages in respect of this breach, and that in point of fact an injunction granted under the present procedure is no more than the remedy which the Court of Chancery always did grant with a view of stopping damage—namely, to prevent a continuance of the breach, so that it would be unnecessary in respect of the period of the injunction to proceed to any enquiry as to damages. For that proposition Mr. Clauson relied on the decision of Stirling J. in *Read* v. *Wotton*. (1) The writ in that action was indorsed as follows: (1.) To recover possession of a house; (2.) and for arrears of rent and mesne profits; (3.) for an injunction to restrain the defendants from doing, or suffering to be done, upon the house any act which might be or become a nuisance to the plaintiff contrary to the provisions of a lease granted by the plaintiff to the defendants dated August 31, 1886; and (4.) damages. In the action the plaintiff moved for an injunction and the defendant served a cross-notice of motion to strike out the writ on the ground that the plaintiff had failed to obtain leave before the issue of the writ for the joinder of the cause of action relating to the injunction with the cause of action relating to the recovery of possession.

(1) [1893] 2 Ch. 171.

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Stirling J. held that the writ did not combine two causes of action because the interlocutory injunction was only asked for as ancillary relief, and that as regarded the interlocutory injunction he had power to grant it for this reason—namely, that the damages claimed were in respect of a continuing cause of action, and that under Order XXXVI., r. 58, damages might be assessed down to the time of the assessment. "Consequently," he said, "if it is proved at the trial that there has been a breach of the contract under which the premises are held before action brought, continuing at the time when the action is brought, and down to the trial, damages may be assessed down to not only the issue of the writ, but to the time of assessment. What is claimed is an injunction. If there were a statement of claim there might be relief asked inconsistent with the rule. A perpetual injunction might possibly be inconsistent; but it seems to me that an interlocutory injunction is within the terms of the rule, for it is a mere substitute for the damages which might be assessed for the continuing breach between the issue of the writ and the trial of the action. The claim for an injunction is made "in respect of damages for the breach of any contract under which the premises are held." The writ so understood falls within the terms of the rule, and the preliminary objection therefore fails. The motion to set aside the writ must be dismissed with costs, to be the plaintiff's costs in any event." The report adds that on the plaintiff's motion his Lordship granted an interlocutory injunction. Now I think in that case Stirling J. did hold that the writ, on its proper construction, amounted to a determination of the lease, and on a writ so framed, he held that it was permissible for him to grant an injunction in respect of what was there alleged to be a breach of a continuing covenant; and he also held that the reason why he could do so was that in respect to that breach of covenant contained in a lease which, according to the hypothesis in the writ, had ceased to be binding, he was entitled to award damages down to the date of the trial. His decision, therefore, appears on the face of it to be a clear authority in favour of Mr. Clauson in the

present case. But it is to be observed that neither *Jones* v. *Carter* (1) nor *Birch* v. *Wright* (2) were cited before Stirling J. nor does any argument appear to have been addressed to him urging the point which has been so strongly urged on me in the present case. If it had been I think he would have been bound to accept it as binding upon him. Moreover, I find that Stirling J. himself in an earlier case reported only in the Weekly Notes—*Hambling* v. *Wallani* (3)—does recognize the principle which I have been endeavouring to expound on the authority of the earlier cases. Further, in *Read* v. *Wotton* (4), the injunction was asked in respect of a matter so serious as a nuisance, and although it was expressed to be a nuisance in respect of a breach of covenant contained in the lease it appears to me that apart from the terms of the covenant, the complaint was of so urgent a nature that, on the principles laid down by Kindersley V.-C. in *Lowndes* v. *Bettle* (5), it would have been quite permissible for Stirling J. to have granted an injunction on that ground alone.

Under these circumstances, having regard to the earlier authorities, I do not feel myself forced to accept the decision of Stirling J. in *Read* v. *Wotton* (4) as affecting the well settled principles which appear to me to be in question here.

A further point was taken by Mr. Clauson in his reply. He contended that the injunction he asked for might be supported on the ground that, it being open to him in an action framed as this is, to apply on interlocutory motion for possession either directly or through a receiver, the injunction asked for might be awarded as being in the nature of relief which fell short of that extreme remedy.

Now, I think the authorities do show that in an action for the recovery of land an interim order for possession or an order appointing a receiver may in a proper case be made on motion, and so far it seems to me that Mr. Clauson's argument was well founded.

(1) 15 M. & W. 718.
(2) 1 T. R. 378.
(3) [1889] W. N. 133.
(4) [1893] 2 Ch. 171.
(5) 33 L. J. (Ch.) 451.

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But in this case there was no application made for possession, either directly or indirectly; the motion was opened and argued as one for an injunction to restrain a breach of covenant actual and apprehended, and nothing else. No application to amend the notice was made, nor in the circumstances could it have been made successfully. Accordingly, as it seems to me, Mr. Clauson was never in a position to ask for this injunction as being in effect less than an order for possession when the plaintiffs had neither asked for such an order nor made a case for it. But, further, no authority was cited for the proposition that a plaintiff, even if in a position to ask successfully for an order for possession, is entitled to obtain at the hands of the Court, and in spite of the defendant's opposition, some form of order more convenient to himself merely on his suggestion that it is less drastic than the order for possession to which he is on this hypothesis entitled.

I can well understand that the Court might accept from the defendant an undertaking to some effect which would give to the plaintiff all the protection he required. But that is a very different thing from saying that the Court will at the instance of the plaintiff, and against the defendant's will, award an injunction in the same terms. In my judgment, therefore, this further contention is not well founded. In the result, therefore, I dismiss the motion as against the other defendants with costs, and make no order on the motion as against Hitchings, Ld., except that the costs of the motion shall be theirs in any event.

Solicitors for plaintiffs: *Routh, Stacey & Castle.*

Solicitors for respondents: *Corbould, Rigby & Co.; Stanley Evans & Co.; Arnold, Chadwick, Fooks & Co.*

A. C.

In re ANGLO-AUSTRIAN BANK, ENEMIES (VOGEL'S YOUNGER APPLICATION).

[1918 A. 828.]

In re DRESDNER BANK, ENEMIES (ELLERT'S APPLICATION).

[1918 D. 917.]

In re DIRECTION DER DISCONTO GESELLSCHAFT, ENEMIES (GUTSCHOW'S APPLICATION).

[1918 D. 916.]

J.

1919

July 22, 23, 24, 31.

War—Emergency Legislation—Enemy Business in England—Licence to Continue—Manager under Enemy Contract—Winding Up—Whether Contract Cognisable in English Court—Debt of Business—Trading with the Enemy Amendment Act, 1916 (5 & 6 *Geo.* 5, *c.* 105), *s.* 1, *sub-ss.* 1, 3.

G. was appointed manager of a branch in England of a German bank by a contract of 1911 between the bank and himself, for five years, and afterwards subject to a year's notice. The contract was in German, made and executed in Berlin. On war being declared with Germany on August 4, 1914, the branch was closed by the British Government, but was re-opened on August 10 under licence pursuant to the Aliens Restriction Act, 1914, for defined purposes and under supervision. In 1918 it was ordered to be wound up under the Trading with the Enemy Amendment Act, 1916. G., who had acted as manager with the approval of the head office at Berlin, was on July 29, 1918, notified by the controller that his further services were dispensed with and his salary to that date was paid.

Held, that the contract and the rights of the parties to it were governed by German law, and according to that law the contract was not determined by the outbreak of war, but remained in full force.

Whether the contract was cognisable in an English Court, quaere.

But, if it was, G., having been paid for services actually rendered to the London business, was not entitled to any further sum as a debt of that business within the meaning of the Act of 1916.

In re W. Hagelberg Aktien-Gesellschaft [1916] 2 Ch. 503 applied.

ADJOURNED SUMMONSES.

The question was whether the applicants, who acted as de facto managers of the businesses in the United Kingdom of the Anglo-Austrian bank, the Dresdner Bank and the Disconto Gesellschaft respectively, when those businesses were in July, 1918, ordered to be wound up, were entitled, under contract

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or as damages for wrongful dismissal, to any sums in respect of employment after their services were in fact dispensed with by the controller. The case of the Direction der Disconto Gesellschaft was taken on the facts of which the principle applicable to all should be determined. In that case, Mr. Gutschow was appointed manager of the London branch of the Disconto Gesellschaft by a contract of September 5, 1911, between the Disconto, described as being represented by their fully responsible partners at Berlin, of the one part, and Mr. Gutschow, described as formerly of Rio de Janeiro and subsequently of London, of the other part. By that agreement Mr. Gutschow took over the management of the London branch of the Disconto, jointly with another manager, on November 1, 1911; he undertook to devote the whole of his endeavours to his new post; he might only accept other positions such as directorships or honorary posts with the consent of the fully responsible partners of the Disconto; he had to take up his residence in London or in an easily accessible suburb of London; he was entitled to a salary of 2000*l.* per annum payable monthly; he was to have a holiday of four weeks a year, but the date of the holiday was to be arranged with the partners of the Disconto. The contract was to subsist for five years from October 1, 1911, and, if neither of the parties had given notice to determine it at least one year prior to its termination, then it was to continue for an indefinite period with the provision that it could always be determined on one year's notice. It was in German, made and executed at the head office in Berlin.

War with Germany was declared on August 4, 1914. The London branch of the Disconto was thereupon closed by the British Authorities until August 10, when, under licence from the Home Secretary given in pursuance of the Aliens Restriction Act, 1914, it was re-opened for certain strictly defined purposes under the supervision of Sir William Plender. On September 19, 1914, a substituted licence was granted, and under one licence or the other the permitted transactions of the branch were continued until July 15, 1918, when, by order of the Board of Trade, the business carried on in the

United Kingdom by the Disconto, so far as it remained, was ordered to be wound up and Mr. Brougham, the official receiver, was appointed controller to control and supervise the carrying out of the order. From the date of the first licence until the date of the winding up Mr. Gutschow continued to act as manager of the London agency under Sir William Plender's supervision and control, and with the knowledge of the head office at Berlin. On July 29, 1918, Mr. Gutschow was notified on behalf of Mr. Brougham that his services at the London agency were thenceforth dispensed with. All his salary up to that date was duly paid.

The question was whether he was entitled to claim any further sum against the assets of the London agency as a debt of the business under his contract of service or for wrongful determination of it.

Schiller K.C. and *C. W. Lilley* for the applicant. The contract was not dissolved by the outbreak of war. Its continuance did not necessarily involve intercourse with the enemy and was not against public policy. It continued in existence after the war broke out, and is a contract recognized by the law of this country, and has been in force all through: *Tingley* v. *Müller* (1); *Daimler Co.* v. *Continental Tyre and Rubber Co.* (2)

The licence must be taken to have wiped out the stain of being an enemy and to have the retrospective effect of treating the bank as if it was not an enemy at all. The Act of Parliament in giving the Secretary of State power to issue the licence necessarily involved giving him power to recognize the continued existence of the contract, or to re-create it as completely as if it had not been dissolved a few days before.

The winding up order did not put an end to the contract: *Reid* v. *Explosives Co.* (3)

The claim is for a debt of the business and must be paid out of its assets, either under the contract or as damages for wrongful dismissal.

(1) [1917] 2 Ch. 144, 157. (2) [1916] 2 A. C. 307.
(3) (1887) 19 Q. B. D. 264.

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[They also cited *In re Coutinho Caro & Co.* (1) and *Wolf & Sons* v. *Carr, Parker & Co.* (2)]

Maugham K.C. and *F. K. Archer* for the controller. The Court is not concerned with any claim that can be made according to German law. Foreign law has nothing to do with it. The contract was abrogated by the outbreak of war as involving possible constant intercourse with the enemy: *Ertel Bieber & Co.* v. *Rio Tinto Co.* (3); *In re Coutinho Caro & Co.* (1) Being abrogated, there was no one who could revive it. It was dead. No one could ex post facto say it should continue. From the outbreak of war there was a hiatus until the licence. The contract was gone. The licence did no more than give protection against criminal proceedings for doing things which could not otherwise be done. The object of the licence was not to restore the German bank and enable it to be carried on as before. The licence was the direct contrary of saying the bank should go on as before. The permission, though in form addressed to the German bank, was not really addressed to it but was addressed to individuals protecting them in doing what they could not otherwise do without infringing the criminal law. It was never intended as an authority to a German bank to carry on business in this country. The Secretary of State had no power under the Aliens Restriction Act or the order made in pursuance of it to say the contract should be restored or treated as if it had never been dissolved—to validate a contract which had been invalidated. In fact the bank in Berlin has accepted the manager as having authority ad hoc. This is far from a case of resuscitating an ancient contract. It was a new arrangement entered into by Sir W. Plender. At the utmost, the old arrangement applied only so far as suited the new circumstances.

If the claimant is right in saying the contract continues, he has his remedy against the German bank; but he has none against the assets of the business here.

[They also referred to *Rodriguez* v. *Speyer Brothers* (4);

(1) [1918] 2 Ch. 384.
(2) [1915] W. N. 195; 31 Times L. R. 407.
(3) [1918] A. C. 260.
(4) [1919] A. C. 59, 128.

Naylor, Benzon & Co. v. *Krainische Industrie Gesellschaft* (1); *In re R. S. Newman, Ld.* (2); Dicey's Conflict of Laws, 2nd ed., p. 553.]

Austen-Cartmell for the Board of Trade. The Board supports the controller. If the applicant were right, the Board would never know when the winding-up could end, if he were to go on being entitled to salary. The Court has always taken the view in these cases that the contract is dissolved, and it then becomes a question only of quantum meruit. If the contract was alive at the date of the winding-up order, it continued only to the end of the employment. But the contract was dissolved on the outbreak of war; the licence did not resuscitate it to its former extent; it gave the German bank authority to employ the manager ad hoc; it gave authority to carry on banking business under limitations; it gives no claim to damages. The Board's view is midway between the extremes of the applicant who says the contract was never dissolved and the controller who says it was completely dissolved. The applicant has no claim in law, having already received his salary up to the time of the conclusion of his employment: *In re Dieckmann.* (3)

Schiller K.C. in reply. There is no authority for the proposition that a contract of service is abrogated by war. The manager was in the position of custodian of the bank's property. An agent can do his duty without any communication with his principal. The effect of outbreak of war on a contract of agency is that it may make it impossible for the agent to go on acting except on his own responsibility, it may limit his opportunities and, as in this case, make it impossible for him to communicate with his principal; but it does not affect the contract itself or its validity. The other ground besides communication with the enemy on which a contract is abrogated by war arises in the case of insurance where it is against public policy that an enemy should be indemnified in the event of his country being defeated and England winning: *Janson* v. *Driefontein Consolidated Mines, Ld.* (4); but that is not this case.

(1) [1918] 1 K. B. 331, 344.
(2) [1916] 2 Ch. 309.
(3) [1918] 1 Ch. 331.
(4) [1902] A. C. 484.

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The motif of the licence was not that but for it an offence would be being committed under the Common Law. What was done was very much in the interest of public policy, because otherwise there might have been financial disaster. It is not the fact that the Berlin bank sanctioned ex post facto what was done so far as necessary to carry out the licence.

Cur. adv. vult.

July 31. YOUNGER J. These summonses raise the same question of principle, although the circumstances of each case are by no means identical. The question is whether the respective managers de facto, acting as such when the businesses in the United Kingdom carried on by the Disconto Gesellschaft, the Dresdner Bank and the Anglo-Austrian Bank were by order of the Board of Trade directed to be wound up in July of last year, are entitled to claim as debts of these respective businesses, either under their contracts which have never, it is said, been validly determined, or in name of damages for wrongful dismissal, any sums in respect of their employment after the date when their services as such managers were in fact dispensed with by Mr. Brougham, the controller appointed to conduct the winding-up.

The circumstances, as I have said, are not in each case the same, but the claim of Mr. Gutschow, the manager of the London Agency of the Disconto Gesellschaft, was, without objection by Mr. Maugham appearing for the controller, selected by Mr. Schiller, who appeared for all the managers, as the basic case with reference to which, when decided, the other two could readily be disposed of. I am not unconscious that there were forensic advantages in that selection, from Mr. Schiller's point of view, but I will adopt in this judgment as quite convenient the course followed in the argument by Counsel on both sides.

[His lordship then stated the terms of the contract with Mr. Gutschow as set out above, and continued :] The contract is in the German language, it was made in Berlin. It was, indeed, executed at the headquarters of the bank there with the supreme governing authority on behalf of the bank. It was,

in my judgment, upon the face of it, a contract under which Mr. Gutschow, whose service with the bank had previously, it would appear, been at Rio de Janeiro, was transferred by the Berlin authorities to London, and was placed in charge there under the direction and control of the governing body of the whole bank at Berlin, described in the contract as the fully responsible partners. On the face of the contract the salary, although expressed in sterling, is payable by the bank at Berlin, and the liability of the bank at Berlin for payment of that salary, whatever may for convenience have been the actual practice, cannot, I think, be doubted.

In my judgment this contract so made in Germany, written in German, for service with a German company which was controlled and directed from Berlin, is a contract the law of which is German, and the rights of both parties under it are determinable by German law.

Now, the war has by German law and in Germany had no effect upon that contract. An affidavit by Dr. Schuster on the German law applicable to the case has been filed on Mr. Gutschow's behalf, and the contract, as I understand that affidavit, remains by German law in full force to-day. Bearing that fact in mind, I need only very briefly refer to the circumstances so well known which lead to Mr. Gutschow's present claim.

[His lordship then stated the facts, set out above, from the outbreak of war down to the dispensing with Mr. Gutschow's services in July, 1918, and saying that he was not surprised that the head office in Berlin approved Mr. Gutschow's continuance as manager in view of the fact that his contract with the bank remained, by German law, in full force undetermined, continued :] The question on the present summons is whether, as against the assets of the London agency and as a debt of its business, Mr. Gutschow is entitled to make any further claim in respect of his contract of service or for its wrongful determination.

Now, of course, this question is entirely apart from his right to make his full claim against the bank itself in Germany. I see no reason to doubt that whatever rights his contract in

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the event gives him by German law are fully enforceable there. But his claim against the assets of the English business now being wound up stands upon a very different footing. Assuming, without by any means asserting, that I may in this Court proceed upon the footing that the contract is cognisable here because it remains valid by German law, which is the law of the contract, still, unless Mr. Gutschow's claim can be properly described as a debt of the business within the meaning of the Trading with the Enemy Amendment Act, 1916, as interpreted in *In re Hagelberg Aktien-Gesellschaft* (1) and approved by the Court of Appeal in subsequent cases, it is not admissible in this winding-up at all.

Now, in my judgment, this claim is not such a debt. I agree that notwithstanding the terms of the contract, which appear to contemplate that all payments will be made from head-quarters, the payment of salary for services actually rendered to the London business was a satisfaction of a debt of that business within a very rational interpretation of an entirely non-technical expression. But I can myself see no ground for holding that either a claim for salary under a contract made with the head office and in respect of a period when no services were rendered to the agency or for damages for the supposed determination of a contract which, so far as I can see, only Berlin could determine, can be said to be made in respect of such a debt. In my judgment every so-called debt of the London business in respect of this contract was discharged when Mr. Gutschow's salary to July 30, 1918, was paid.

This view of the case relieves me of the necessity of considering whether by English law the contract of September 5, 1911, is one the existence of which can now for any purpose be recognised in an English Court. The elaborate arguments on that question on both sides and the far-reaching consequences of a deliverance upon it make it desirable that it should be left undecided until a decision can no longer be avoided.

In the result the claim of Mr. Gutschow on his summons, in my judgment, fails. In his failure are involved Mr. Vogel

(1) [1916] 2 Ch. 503.

on his summons and also Mr. Ellert on his, neither of whose cases is so strong as that of Mr. Gutschow. The controller is not, in my judgment, bound or entitled to admit these claims in the winding-up concerned.

Solicitors: *Stephenson, Harwood, Henderson, Witt & Mackintosh, for Vogel; Herbert Smith, Goss, King & Gregory, for Ellert; Rehder & Higgs, for Gutschow; Peter Thomas & Clark, for controller; Solicitor to Board of Trade.*

A. L.

PIERCY *v.* S. MILLS & COMPANY, LIMITED.

[1918 P. 1505.]

Company—Issue of Shares—Fiduciary Power of Directors—Shares issued by Directors to themselves to retain Control of Company—Breach of Trust—Invalidity.

A power to issue shares in a limited company given to directors for the purpose of enabling them to raise capital when required for the purpose of the company is a fiduciary power to be exercised by them bona fide for the general advantage of the company, and when the company is in no need of further capital, directors are not entitled to use their power of issuing shares merely for the purpose of maintaining their control, or the control of themselves and their friends, over the affairs of the company, or merely for the purpose of defeating the wishes of the existing majority of shareholders.

The principle of *Fraser* v. *Whalley* (1864) 2 H. & M. 10 and *Punt* v. *Symons & Co.* [1903] 2 Ch. 506 applied.

WITNESS ACTION.

The following statements of facts and of the result of the evidence is taken from his Lordship's judgment:—

"This is an action in which the plaintiff claims a declaration that the allotments of 150 preference shares in the defendant company to Mr. Shercliff, one of the defendants, 100 preference shares in the company to the defendant Mr. King, 150 preference shares to the defendant Mr. Skellett, and 200 preference shares to the defendant Mr. Wainwright, were made in breach of the fiduciary powers of the directors of the defendant

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company and were void, and that the allotments ought to be cancelled.

"This was a company which, when the events which gave rise to this action took place, had a capital of some 4252 issued shares of 1*l.* each, some ordinary and some preference. The two directors were Mr. Shercliff and Mr. King. The plaintiff had been appointed a temporary manager at a remuneration. Some difficulties arose between him and the directors Mr. King and Mr. Shercliff, who did not consider him suitable for the position. But the matter was complicated by the fact that the plaintiff had acquired a majority of the shares; out of the 4252 issued shares he had become the holder of, or was entitled to, 2146, and desired to become one of the directors. It may be, and for this purpose I will assume, that the directors were right in considering that he was not altogether a fit person to be a director of this company, but, having the largest interest in the company, it was not unnatural that he should desire to be on the Board of Directors.

"On September 17, therefore, he intimated to the directors that he wished to be a director. The two existing directors considered the question, and came to the conclusion that it was undesirable that he should be appointed a director. On September 30 the plaintiff, having no doubt been irritated by the refusal of the existing directors to exercise their powers of electing him to be a member of the Board, sent this notice to the directors: 'I, the undersigned member of the company, give you notice that it is my intention at the next general meeting of the company at which it shall be competent to nominate directors, to nominate the following for election.' Then he nominated his two brothers and himself. The result of this move would have been that at the next general meeting, having the majority of the shares, he would have elected a majority of the Board of Directors. On October 1 he sent a notice to the directors requiring them to call a meeting of the company for the purpose of considering resolutions which he proposed to put forward. The plaintiff gave an account of the manner in which he and his brother went to the public library and consulted law books, with the result that, ulti-

mately, they produced this series of proposed resolutions. The first resolution was, 'That the existing directors be removed,' and the second was, 'That the company be wound up voluntarily.' It is manifest that he could not, if he had realized the effect of them, have put the two resolutions as anything but alternatives. In any case it is quite clear that he had not a majority to carry either of these resolutions. Then the other series contains a number of resolutions which in the main are not inconsistent with the proposal of the plaintiff in the notice of September 30 to elect further directors.

"I think it fairly clear that what the plaintiff was aiming at was, first, to get on to the Board himself, and when the directors refused to appoint him, to have the number of directors raised to the maximum number permitted under the articles, the vacancies being filled up with his nominees.

"On October 17 the directors dismissed the plaintiff from the position of manager. On October 18 Mr. Shercliff wrote to Mr. King: 'Many thanks for your letter of the 17th instant. The issue of sufficient shares to retain full control seems to be the best way out of the mix up.' On October 23 the two directors met, and, amongst other things, they resolved 'that preference shares be hereby allotted to the following persons,' namely, to Mr. Neal, 100 shares—he is not a party to the action, and therefore the question of the allotment of shares to him is not under consideration in the present proceedings—Mr. King 100 shares, and to Mr. Shercliff 150 shares.

"I have heard Mr. King and Mr. Shercliff on the subject of the issue of these shares, and they were, especially Mr. Shercliff, perfectly frank on the subject. It is manifest from the letter of October 18, and from the evidence of the two witnesses, that the shares were allotted simply and solely for the purpose of retaining control in the hands of the existing directors. It was about this time that Mr. Skellett and Mr. Wainwright, who were connected with Mr. Shercliff in the business that he carried on, were appointed co-directors by Mr. King and Mr. Shercliff, and their director's qualification was provided by transfers of shares from Mr. Shercliff. By the manœuvre of the allotment of the shares, which took place on October 23,

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the directors and their friends had obtained a small majority over the plaintiff and his friends, and the result was that the resolutions which were proposed by the plaintiff were defeated. The plaintiff, however, had been in negotiation for the acquisition of other shares in the company, and, having obtained a further block of shares, small in number, but sufficient to give him a new majority, he then proceeded to requisition the directors to call another meeting, and, on November 13, he deposited a transfer of the shares which he had acquired with the company for registration. The directors apparently considered that this move required immediate attention, and on November 14 Mr. Shercliff and Mr. King met and proceeded to allot to their two new co-directors, Mr. Wainwright and Mr. Skellett, further shares, with the result that they and their friends had a majority over the plaintiff once more. In this case, also, it is manifest from the evidence that these shares were allotted solely for the purpose of keeping the control and maintaining the majority over the plaintiff, and it is also quite clear that all the four directors fully realized that that was the sole object. As soon as this fresh allotment came to the knowledge of the plaintiff he very wisely withdrew his requisition, and brought this action for the purpose of determining the question whether acts of this character on the part of the directors were or were not legitimate."

The defendant company had been incorporated in 1903, with an authorized capital of 10,000*l.* divided into 5000 preference shares of 1*l.* each and 5000 ordinary shares of 1*l.* each. The Articles of Association provided (inter alia) that every member present in person should have one vote for every share held by him; that the number of directors should not be less than two nor more than five; that, until otherwise determined, two directors should form a quorum at meetings of the directors; and that the directors should have power from time to time and at any time to appoint any other persons to be directors.

Article 80 provided as follows: "No director shall be disqualified by his office from contracting with the company either as vendor, purchaser, or otherwise, nor shall any such

contract or arrangement, or any contract or arrangement entered into by or on behalf of the company in which any director shall be in any way interested be avoided, nor shall any director so contracting or being so interested be liable to account to the company for any profit realized by any such contract or arrangement by reason of such director holding that office or of the fiduciary relations thereby established."

The evidence showed that at the time of the issue of the shares in dispute in this action the company was not in any need of any further capital.

Tomlin K.C. and *H. E. Wright* for the plaintiff. The company was in no financial need of this further issue and the issue and allotment of these shares were made by the directors simply for the purpose of retaining the controlling power. Directors cannot lawfully use powers vested in them in a fiduciary character for such a purpose: *Fraser* v. *Whalley* (1); *Punt* v. *Symons & Co.* (2). Their duty and their interest were in conflict, and in making these allotments they were utilising their power for their own ends.

Further, "no director can, in the absence of a stipulation to the contrary, partake in any benefit from a contract which requires the sanction of a board of which he is a member": Buckley on the Companies Acts, 9th ed., pp. 639, 640. An article allowing him to contract with the company does not enable him as director to say whether there shall be any such contract; the other directors have to do that. Apart from a special clause to that effect, it is not open to him as director to vote on the question of a contract with himself.

[PETERSON J. referred to *Lagunas Nitrate Co.* v. *Lagunas Syndicate.* (3)]

Article 80 is intended to relate only to a director contracting with the company. The question of an allotment of shares amounting to a contract or arrangement with the company was raised in *Quinn* v. *Robb* (4) and *Neal* v. *Quinn* (5), but there is nothing in this article to justify a director giving advice to

(1) 2 H. & M. 10.
(2) [1903] 2 Ch. 506.
(3) [1899] 2 Ch. 392.
(4) (1916) 141 L. T. Jour. 6.
(5) [1916] W. N. 223.

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the company which results in the company entering into an agreement with the director by means of his vote.

Hughes K.C. and *Ashton Cross* for the defendant directors. The question really is whether when an attempt is made by one or two shareholders to get control of the shares for the purpose of wrecking the company the directors are entitled to allot shares for the purpose of saving the company. *Fraser* v. *Whalley* (1) was a very special case, and the power was given to the directors for a particular purpose, for which it was not being used, and that was the ground upon which the interlocutory order in that case was made, and in *Punt* v. *Symons & Co.* (2), which was also interlocutory, the injunction was confined to restraining the holding of the confirmatory meeting in contemplation of which the shares had been issued. The defendants Wainwright and Skellett were not present at the meeting when the allotment was made to them, and they were not cognisant of the motive. There is no evidence to show that the allotment of shares to them should be cancelled.

The allotment of shares is a contract or arrangement : *Quinn* v. *Robb* (3) ; *Neal* v. *Quinn* (4), but art. 80 is the answer to my objection on that ground. There was no converse article in this case as there was in *Neal* v. *Quinn.* (4) If one of the many motives for the allotment was to control the voting power, that is not enough to invalidate the whole allotment.

Duka for the defendant company.

Tomlin K.C. in reply.

PETERSON J. stated the facts as above set out, and continued :—

The question is whether the directors were justified in acting as they did, or whether their conduct was a breach of the fiduciary powers which they possessed under the articles. What they did in fact was to override the wishes of the holders of the majority of the shares of the company for the time being by the issue of fresh shares issued solely for that purpose. There are two cases to which my attention

(1) 2 H. & M. 10.
(2) [1903] 2 Ch. 506.
(3) 141 L. T. Jour. 6.
(4) [1916] W. N. 223.

has been called. One is *Fraser* v. *Whalley* (1), in which there are some observations which are in point, though I agree that the case had points of difference from the present case. The learned judge in that case came to the conclusion that the directors were not justified in using their powers for a purpose which had once been authorized but which had come to an end. In the course of the argument the Vice-Chancellor remarked: "No doubt both sides think their views the best for the company. But have you a right to force your views upon the majority of the shareholders by the exercise of a power of this kind?" In his judgment the Vice-Chancellor said: "I cannot look upon these directors otherwise than as trustees for a public company, and I must judge of the propriety of their conduct in this matter on the ordinary principle applicable to cases of trustee and cestui que trust. . . . But . . . . the point is reduced to this—the directors are informed that at the next general meeting they are likely to be removed; and therefore, on the very verge of a general meeting, they, without giving notice to anyone, with this indecent haste and scramble which is shown by the times at which the meetings were held, resolve that shares are, on the faith of this obsolete power entrusted to them for a different purpose, to be issued for the very purpose of controlling the ensuing general meeting. I have no doubt that the Court will interfere to prevent so gross a breach of trust. I say nothing on the question whether the policy advocated by the directors, or that which I am told is to be pursued by Savin, is the more for the interest of the company. That is a matter wholly for the shareholders. . . . . If the directors can clandestinely, and at the last moment, use a stale resolution for the express purpose of preventing the free action of the shareholders, this Court will take care that, when the company cannot interfere, the Court will do so." It was said that the real point of that case was that the directors were using what the Vice-Chancellor calls a stale resolution, but I think the real substance of his judgment is that the directors were not entitled to issue shares for the express purpose of preventing the free action of the share-

(1) 2 H. & M. 10, 27, 28, 29.

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holders. In *Punt* v. *Symons & Co.* (1) the question was again somewhat similar to that in the present case. Byrne J., in a reserved judgment, after dealing with the first point, which is immaterial for the present purpose, says this : " I now come to the last and most important point. It is argued on the evidence that but for the issue by the directors of the shares under their powers as directors, and, therefore, in their fiduciary character under the general power to issue shares, it would have been impossible to pass the resolution proposed ; and that the shares were not issued bona fide, but with the sole object and intention of creating voting power to carry out the proposed alteration in the articles." The shares, he says, were not issued bona fide for the general advantage of the company, but they were issued with the immediate object of controlling the holders of the greater number of shares in the company, and of obtaining the necessary statutory majority for passing a special resolution. Then he continues : " A power of the kind exercised by the directors in this case, is one which must be exercised for the benefit of the company : primarily it is given them for the purpose of enabling them to raise capital when required for the purposes of the company. . . . . When I find a limited issue of shares to persons who are obviously meant and intended to secure the necessary statutory majority in a particular interest, I do not think that is a fair and bona fide exercise of the power." The basis of both cases is, as I understand, that directors are not entitled to use their powers of issuing shares merely for the purpose of maintaining their control or the control of themselves and their friends over the affairs of the company, or merely for the purpose of defeating the wishes of the existing majority of shareholders. That is, however, exactly what has happened in the present case. With the merits of the dispute as between the directors and the plaintiff I have no concern whatever. The plaintiff and his friends held a majority of the shares of the company, and they were entitled, so long as that majority remained, to have their views prevail in accordance with the regulations of the company ; and it was not, in my opinion,

(1) [1903] 2 Ch. 506, 515.

open to the directors, for the purpose of converting a minority into a majority, and solely for the purpose of defeating the wishes of the existing majority, to issue the shares which are in dispute in the present action.

In my opinion, therefore, the issue of the shares in question to the four defendants was a breach on the part of the directors of their fiduciary powers. In the case of the last two allotments, those to Mr. Skellett and Mr. Wainwright, they were made to them with their full knowledge that the allotments were being made for the illegitimate purpose which I have described. I am therefore of opinion that these four allotments were invalid and ought to be declared void.

Solicitors: *Pepper, Tangye & Watson, for Pepper, Tangye & Winterton, Birmingham; Timbrell & Deighton, for C. Upfill Jagger, Birmingham.*

R. M.

SMEETON *v.* ATTORNEY-GENERAL.

[1917. S. 1108.]

Revenue—Excess Profits Duty—Profession of Engineer—Receipt of Commission—Service of Notice requiring Return—Denial of Liability—Action against Attorney-General for Declaratory Judgment—Discretion of Court—Question of Fact peculiar to Plaintiff—No Public Interest—Appropriate Remedy provided by Act—Dismissal of Action—Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89), ss. 39, 44, 45, sub-s. (5).

The plaintiff was served with a notice under Part III. of the Finance (No. 2) Act, 1915, requiring him to make a return for the purposes of excess profits duty in respect of his trade or business. As an advising engineer he was engaged in a profession dependent mainly upon his personal qualifications but, since July, 1915, in addition to his private practice, he had negotiated Government contracts on behalf of a company making munitions of war and had advised the company generally as an engineer. For this he received a fixed retaining fee per week and also a fixed payment for each shell and fuse of a certain description supplied by the company. The plaintiff claimed to be within the exception (*c*) to s. 39 of the Act, exempting him from excess profits duty, denied his liability to furnish a return or supply information to the Commissioners, and commenced this action for a declaratory judgment to that effect.

The Court in the exercise of its discretion, and without expressing any

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opinion upon the question whether the plaintiff was carrying on a trade or business which was subject to the provisions of Part III. of the Act, refused to make any declaratory order, being of opinion (1.) that the elements of invalidity and public interest present in *Dyson* v. *Attorney-General* [1912] 1 Ch. 158 and *Burghes* v. *Attorney-General* [1912] 1 Ch. 173 were absent from this case, in which the real question was whether the plaintiff's business was within s. 39 or not, and (2.) that it was not desirable that cases of this character, in which the right of appeal prescribed by the Act was available to the plaintiff if dissatisfied with his assessment, should be withdrawn from the Court constituted for the purpose of dealing with Revenue cases.

WITNESS ACTION.

The plaintiff was an advising engineer practising his profession in London. In July, 1915, Marshall, Sons & Co., Ld., of the Britannia Iron Works, Gainsborough, being about to make munitions of war, consulted the plaintiff, and negotiations ensued resulting in an agreement contained in the following letter from Mr. Marshall of July 26, 1915: "In consideration of your assistance rendered in negotiating contracts direct for 6-inch shells and No. 100 fuse and for your further promised assistance to us in connection with this matter, we agree to allow you for each shell 3*d.* and for each fuse 1*d.* to be paid as we receive payment from the Government. When the first 50,000 shells is completed and the price reduced the allowance per shell to be 2*d.* instead of 3*d.*" On September 13, 1915, there was a further agreement embodied in the following letter from Mr. Marshall: "We confirm the arrangement made with you by Mr. Harper, that, in addition to the commission on the shells, we should pay you a retaining fee of 3*l.* per week during the continuance of the war, and that you should for this give us your services to clear up any points in connection with any of our Government contracts. We understand that you would like, in order to give you some official standing, to have some cards printed designing yourself as 'Local Director for Government Contracts,' we see no objection to this, and would ask you to have some cards printed for our account." After September, 1915, the company increased the plaintiff's retaining salary from 5*l.* to 10*l.* per week, which amount was paid to cover his personal and staff expenses necessitated by this additional work and

was in addition to the amount payable on the turnover of shells and fuses during the continuance of the war. In return for these payments the plaintiff gave the company all his services required to deal with all their other Government contracts and all technical and financial matters in connection therewith, including the alteration and adaptation of their workshops and plant, but without any further bonus or remuneration of any kind on the increased turnover occasioned thereby. At the same time the plaintiff continued to practise his profession as advising engineer although his time and attention were almost entirely taken up by the services he rendered to Marshall, Sons & Co., Ld., which on a number of occasions compelled him to refuse to entertain applications for his professional advice on engineering matters from other clients.

In March, 1917, the Board of Inland Revenue informed the plaintiff that in their view he was liable to excess profits duty, and on March 12 the District Surveyor served him with the form of return No. 1. (E. P.) Reference E. P. D. 1474, which required him to fill up and deliver the return and warned him of the penalties to which in the event of default he would be liable.

The plaintiff declined to furnish the return, on the ground that he was not either an agent or a person taking commissions in respect of transactions or services rendered within the meaning of s. 39 of the Finance (No. 2) Act, 1915, and commenced this action against the Attorney-General claiming (1.) a declaration that he was under no obligation to make a return on the form No. 1 (E. P.) Reference E. P. D. 1474, dated March 12, 1917, served upon him with a view to the assessment upon him of excess profits duty; (2.) a declaration that he was not liable under s. 39 of the Finance (No. 2) Act, 1915, or under any other statutory enactment to the payment of excess profits duty; and (3.) that he was not under any obligation to comply with the requirements of W. S. Best the Surveyor of Taxes to supply him with information with a view to an assessment of excess profits duty being made upon him.

In his particulars of the statement of claim, delivered

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pursuant to an Order of the Master, the plaintiff furnished much of the information required by the Commissioners.

Tomlin K.C. and *Whinney* for the plaintiff. An action for a declaratory judgment will lie against the Crown: *Dyson* v. *Attorney-General* (1); *Burghes* v. *Attorney-General* (2); *Pawlett* v. *Attorney-General* (3); *Laragoity* v. *Attorney-General* (4); *Deare* v. *Attorney-General* (5); *Hodge* v. *Attorney-General* (6); which last case the Court of Appeal in *Dyson* v. *Attorney-General* (1) accepted as an authority for making a declaratory judgment.

[*Sheldon* for the Attorney-General. Having regard to the decision in *Dyson* v. *Attorney-General* (1), the Attorney-General cannot, in this Court, dispute the proposition that an action of this sort can be brought against him, but he desires to reserve his right to do so before a higher Court.]

It is open to a subject in an action of this kind to sue the Attorney-General although the matter sued on affects only the personal title or specific right of the plaintiff: *Pawlett* v. *Attorney-General.* (3) But this action concerns much more than the personal right of this plaintiff, for it raises the question whether the Commissioners are entitled to attack anyone in respect of his business although it is not a business within s. 39 of the Act, and the determination of that question will be of assistance not only to the public at large but also to the Commissioners as showing them the extent of their powers.

[PETERSON J. referred to *Electrical Development Co. of Ontario* v. *Attorney-General for Ontario.* (7)]

Under Part III. of this Act, s. 38 charges excess profits duty and s. 39 (8) shows to what trades and businesses the duty

(1) [1911] 1 K. B. 410.
(2) [1911] 2 Ch. 139.
(3) (1667) Hardres, 465.
(4) (1816) 2 Price, 172.
(5) (1835) 1 Y. & C. Ex. 197.
(6) (1838) 3 Y. & C. Ex. 342.
(7) [1919] A. C. 687.
(8) Sect. 39 provides: "The trades and businesses to which this part of this Act applies are all trades or businesses (whether continuously carried on or not) of any description carried on in the United Kingdom, or owned or carried on in any other place by persons ordinarily resident in the United Kingdom, excepting—

"(*a*) husbandry in the United Kingdom; and

"(*b*) offices or employments; and

"(*c*) any profession the profits of which are dependent mainly on the personal qualifications of the

applies and excludes from the category any profession the profits of which are dependent mainly on the personal qualifications of the person by whom the profession is carried on. The plaintiff clearly comes within that exception, and so far as the company were concerned all he did for them was on his professional qualification as an engineer. The word "commission" in the final paragraph of the section has given rise to the dispute in this case. Sect. 44 (1) provides for the making of returns, but it gives the Commissioners no power to require returns to be made except in respect of any trade or business to which this part of the Act applies. Every person carrying on such a business and chargeable with the duty has to give notice thereof to the Commissioners before a certain date. The language of the section would have been very different if the Legislature had intended that the Commissioners should be the judges as to whether the business was within the section or not. The plaintiff has made no return, and we submit rightly so, for if a return is made it might be taken as amounting to an admission of liability:

person by whom the profession is carried on and in which no capital expenditure is required, or only capital expenditure of a comparatively small amount,

but including the business of any person taking commissions in respect of any transactions or services rendered, and of any agent of any description (not being a commercial traveller, or an agent whose remuneration consists wholly of a fixed and definite sum not depending on the amount of business done or any other contingency)."

(1) Sect. 44 provides as follows:

"(1.) The Commissioners of Inland Revenue may, for the purposes of this part of this Act, require any person engaged in any trade or business to which this part of this Act applies, or who was so engaged during any accounting period or pre-war trade year, to furnish them within two months after the requirement for the return is made, with returns of the profits of the trade or business during the accounting period or pre-war trade years and such other particulars in connection with the trade or business as the Commissioners may require.

"(2.) It shall be the duty of every person chargeable to excess profits duty under this part of this Act to give notice that he is chargeable to the Commissioners of Inland Revenue before the thirty-first day of January, nineteen hundred and sixteen. . . ."

"If any person fails to furnish a proper return in accordance with this section or to comply with any requirement of the Commissioners under this section, or to give any notice required by this section, he shall be liable on summary conviction to a fine not exceeding one hundred pounds and to a further fine not exceeding ten pounds a day for every day during which the offence continues after conviction therefor."

(3.) . . . . . .

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Foran v. *Attorney-General*. (1) He has commenced this action instead as the only remedy open to him for, although sub-s. (5.) of s. 45 (2) gives a right of appeal to a person "dissatisfied with the amount of any assessment made upon him," that presupposes that a return has been made and has no application to the question in this case which arises at a much earlier stage and which relates not to the amount of the assessment but to the right of the Commissioners to call upon him to make a return.

Upon the merits of the case we submit that the plaintiff was not carrying on any trade or business at all, nor was he taking "commissions." "Commission" generally means a part of the profit made, and he was not taking that. He was carrying on the munitions part of the company's business on his professional qualifications as an engineer. For a business to come within the final paragraph of s. 39 it must be the business of a person taking commissions, i.e., whose business is the business of taking commissions. The phrase "agent of any description" cannot mean what it says otherwise it would include, for instance, a counsel, but it means an agent carrying on "the business of an agent." The reported cases do not afford much assistance. In *Inland Revenue Commissioners* v. *North and Ingram* (3) the question of jurisdiction did not arise as the Commissioners had found in favour of the subject. In *Inland Revenue Commissioners* v. *Maxse* (4) the subject was carrying on an ordinary commercial business as well as his profession and the two were held to be severable. So also

(1) [1915] 1 Ch. 703; affirmed [1916] 2 A. C. 128.

(2) Sect. 45, sub-s. (5.) provides: "Any person who is dissatisfied with the amount of any assessment made upon him by the Commissioners of Inland Revenue under this part of this Act may (except in cases where a special right of appeal is given under this part of this Act) appeal to the General Commissioners for the division in which he is assessed, or to the Special Commissioners, and those Commissioners shall have power on any appeal, if they think fit, to summon witnesses and examine them upon oath.

. . . . .

"Sect. fifty-nine of the Taxes Management Act, 1880 (which relates to the statement of a case on a point of law), shall apply with the necessary modifications in the case of any appeal to the general or special Commissioners under this section, ..."

(3) [1918] 2 K. B. 705.

(4) [1919] 1 K. B. 647.

in *Inland Revenue Commissioners* v. *W. Ransom & Son.* (1) In *Burt & Co.* v. *Inland Revenue Commissioners* (2) the partners were carrying on the business of taking commissions in respect of transactions and services rendered, and in the latest case of *Robbins* v. *Inland Revenue Commissioners* (3) the subject was a whole time servant and was held not liable to be assessed.

We submit that both on the question of jurisdiction and on the merits the plaintiff is entitled to succeed.

Sir Gordon Hewart A.-G., Sheldon, Reginald Hills and *T. H. Parr* for the Commissioners of Inland Revenue. The plaintiff, we submit, ought not to succeed in this action. It concerns only the particular circumstances of this particular plaintiff, and the public at large would have no interest in the declarations, if made. In this respect this case differs from *Dyson* v. *Attorney-General* (4) and *Burghes* v. *Attorney-General.* (5) Moreover, the statute itself points out a particular and sufficient remedy. Further, the argument ab inconvenienti is of overwhelming force because if the plaintiff succeeds, the decision will affect cases on Income Tax, Property Tax, and House Duty Tax and other like taxes, in all of which the Commissioners will be met with actions for declaratory judgments in the Chancery Division.

In *Dyson* v. *Attorney-General* (4) and *Burghes* v. *Attorney-General* (5) the dispute concerned the validity of forms which were sent all over the country, and the Courts laid great stress upon the widespread interest. It is not now suggested that there is any invalidity in this form and the argument has turned on the particular view of the plaintiff's occupation. This case is peculiar to and affects the plaintiff alone. Nothing has been done beyond sending him a form requiring a return, and in the exercise of its discretion the Court may well decide that he should wait until he is attacked.

Sub-s. (5.) of s. 45 gives a right of appeal to the general or special Commissioners where the subject is dissatisfied with

(1) [1918] 2 K. B. 709.
(2) [1919] 2 K. B. 650; 34 Times L. R. 516; 35 Times L. R. 332.
(3) [1920] 1 K. B. 51; 35 Times L. R. 601.
(4) [1912] 1 Ch. 158.
(5) [1912] 1 Ch. 173.

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the amount of the assessment, and that would cover a case where the subject denies liability to make a return, as occurred in *Inland Revenue Commissioners* v. *Maxse*. (1)

[PETERSON J. But s. 45, sub-s. (5.) assumes that a return has been made.]

Where no return has been made, the Commissioners make an assessment as they are entitled to do, and thereon the subject can appeal.

[PETERSON J. Where is the provision enabling them to assess when no return has been made ?]

Sect. 45, sub-s. (7.) enables the Commissioners to make regulations with respect to the assessment and collection of the duty, and under regulations made in pursuance of that power they may make an assessment where no return is made.

All the plaintiff had to do was to sit still. If he had been served with notice of assessment, he could then have appealed to the special Commissioners and from them to the Court of the Revenue Judge, and then to the Court of Appeal and the House of Lords. The Court of the Revenue Judge is a more fitting tribunal for cases of this sort than a Court of the Chancery Division: *Attorney-General* v. *Constable*. (2)

[PETERSON J. But if he had sat still he would have been liable under s. 44 to all the penalties for not making a return.]

He has incurred those penalties already, and if he fails in this action he will be in no better position. This Act itself affords the machinery for deciding the question raised, and where the Legislature has provided a special tribunal the Court of Chancery will not, except in very special cases, interfere by declarations of right: *Grand Junction Waterworks Co.* v. *Hampton Urban Council* (3) referred to by Warrington J. in *Burghes* v. *Attorney-General*. (4) This is not a case for a declaratory judgment. Some limitation must be put to the operation of Order XXV., r. 5, of the Rules of the Supreme Court as Joyce J. pointed out in *North Eastern Marine Engineering Co.* v. *Leeds Forge Co.* (5)

(1) [1919] 1 K. B. 647.
(2) (1879) 4 Ex. D. 172.
(3) [1898] 2 Ch. 331.
(4) [1911] 2 Ch. 139, 156.
(5) [1906] 1 Ch. 324, 328.

The determination of the question whether a man is liable to have a notice served upon him is left to the additional Commissioners, who have to arrive at a preliminary or provisional finding whether he is liable or not. They have to find the facts on which to establish their jurisdiction: *Rex* v. *Bloomsbury Income Tax Commissioners.* (1) That was a question of income tax but the principle of the income tax cases applies.

The Court is asked in this case to examine all the facts relating to the plaintiff's sources of income and on a detailed consideration to come to the conclusion that he is not within Part III. of the Act. Incidentally in the particulars furnished by the plaintiff in the action, he has given the information which the Commissioners required, and they show that the plaintiff is within s. 39 of the Act. He is not a whole-time servant as was the case in *Robbins* v. *Inland Revenue Commissioners* (2), but on the facts this case falls within *Burt & Co.* v. *Inland Revenue Commissioners.* (3) [On this point they also referred to *Radcliffe* v. *Inland Revenue Commissioners* (4) and *Christopher Barr & Sons* v. *Inland Revenue Commissioners.* (4)]

Tomlin K.C. in reply. Sect. 106 of the Income Tax Act, 1842, puts an obligation on everyone to make a return and s. 118 gives the right to appeal against "an assessment," but under s. 45, sub-s. (5.) of this Act the words are "the amount of an assessment," and that is emphasised by the words of s. 57 of the Taxes Management Act, 1880, dealt with in *Rex* v. *Bloomsbury Income Tax Commissioners* (1), and under s. 72 of the Finance (1909–1910) Act, 1910, relating to super-tax, everyone is bound to make a return, but the provisions of the present Act are altogether distinct.

In none of the cases cited has the question of jurisdiction been raised. The plaintiff has been served with a notice threatening him with penalties on default and "there is really

(1) [1915] 3 K. B. 768.
(2) [1920] K. B. 51; 35 Times L. R. 601.
(3) [1919] 2 K. B. 650; 34 Times L. R. 516; 35 Times L. R. 332.
(4) Unreported.

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no substance in the argument that the form is not a demand or threat"; per Farwell L.J. in *Burghes* v. *Attorney-General* (1), and he is entitled to come to this Court, and more than ever so when there is a genuine bona fide case in which the Inland Revenue Commissioners have no power to decide the question. It is not outside the jurisdiction of this, a superior, Court unless it specially appears to be so: *London Corporation* v. *Cox* (2), and it is quite proper to take proceedings of this sort: *Attorney-General* v. *Lancashire and Yorkshire Ry.* (3), and in *Eastern Trust Co.* v. *McKenzie, Mann & Co.* (4) the principle of taking proceedings of this nature was recognized. There is no jurisdiction on the equity side of the Exchequer Court to make a declaratory judgment and the rules do not provide for it; Sir John Simon's argument in *Dyson* v. *Attorney-General.* (5)

The plaintiff did not take commissions at all and this case is not distinguishable from *Robbins.* v. *Inland Revenue Commissioners.* (6)

Cur. adv. vult.

July 28. PETERSON J. The plaintiff, John Alfred Smeeton, brought this action against the Attorney-General for the purpose, in substance, of obtaining a declaration that he does not carry on a business in respect of which under s. 39 of the Finance (No. 2) Act 1915, excess profits duty is payable. In his claim he asks for a declaration. [His Lordship read the declarations claimed by the plaintiff as above set out, and continued:] He is by profession an advisory engineer. In July, 1915, a company called Marshall, Sons & Co., Ld., was desirous of making munitions of war, and being inexperienced in such matters sought the assistance of the plaintiff. The negotiations resulted in an agreement, the terms of which are set out in a letter from Mr. Marshall of July 26, 1915. That letter runs thus: "In consideration of your assistance rendered in negotiating contracts direct for 6-inch shells and No. 100 fuse

(1) [1912] 1 Ch. 173, 189.
(2) (1867) L. R. 2 H. L. 239, 259.
(3) (1864) 2 H. & C. 792.
(4) [1915] A. C. 750, 759.
(5) [1911] 1 K. B. 410, 414.
(6) [1920] 1 K. B. 51; 35 Times L. R. 601.

and for your further promised assistance to us in connection with this matter, we agree to allow you for each shell 3*d.* and for each fuse 1*d.* to be paid as we receive payment from the Government. When the first 50,000 shells is completed and the price reduced the allowance per shell to be 2*d.* instead of 3*d.*" On September 13, 1915, there was a further agreement embodied in a letter of that date from Mr. Marshall. That letter says: "We confirm the arrangement made with you by Mr. Harper, that in addition to the commission on the shells we should pay you a retaining fee of 5*l.* per week during the continuance of the war, and that you should for this give us your services to clear up any points in connection with any of our Government contracts. We understand that you would like, in order to give you some official standing, to have some cards printed designing yourself as 'Local Director for Government Contracts,' we see no objection to this, and would ask you to have some cards printed for our account." The retaining fee of 5*l.* per week was subsequently increased to 10*l.* per week. For this fee and the remuneration by way of commission the plaintiff rendered to Marshall, Sons & Co., Ld., the assistance which is described in the particulars.

In March, 1917, he received the usual form of notice from the Commissioners of Inland Revenue dated March 12, 1917, requiring him to furnish a return of the profits of the trade or business in which he was engaged or had been engaged during the accounting period for the purpose of assessment to excess profits duty. The notice called attention to the penalties incurred by a failure to make the return within the specified period. The plaintiff has declined to furnish this return on the ground that the profits derived from his connection with Marshall, Sons & Co., Ld., are not assessable to excess profits duty; and now contends that the Commissioners were not entitled to call upon him to make any return, and that he is not bound to give them any information, as these profits were not derived from any business or occupation which comes within the provisions of s. 39 of the Act. [His Lordship read the section and continued:] Under s. 44 the Commissioners are authorized to require any person engaged in any trade or

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business to which Part III. of the Act applies to furnish returns of the profits of that trade or business. The plaintiff contends that he was not engaged in any such trade or business, and asks for a declaration accordingly. A peculiarity of this case is that the plaintiff has been constrained in the course of the action to supply much of the information which he claims to be entitled to withhold from the Commissioners of Inland Revenue.

It has been contended that this is not a case in which a declaration should be made, and that this question ought to be determined, as it has been in many other cases, by the Commissioners with an ultimate appeal to the Court which deals with Revenue cases. It is admitted that while the Court has jurisdiction to make a declaration in such a case as the present the exercise of the jurisdiction is discretionary. Reliance was placed by the plaintiff's counsel on *Dyson* v. *Attorney-General* (1) and *Burghes* v. *Attorney-General.* (2) In *Dyson's Case* (1) the Commissioners of Inland Revenue had issued broadcast a form which required the recipients to supply information which the Commissioners were not entitled to exact from anyone and had also required the plaintiff to make this return within less than the statutory period. The supply of this information involved or might involve considerable expense. In *Burghes' Case* (2) the Commissioners had served the plaintiff with a notice which purported to be in pursuance of their statutory powers but was in fact of a kind which they had no authority to serve on anyone. This again was an unauthorized form which the Commissioners were requiring a large number of His Majesty's subjects to fill up. In each case the Commissioners called attention to the statutory penalties which would be incurred by anyone who neglected to comply with their requirements; and in each case the only way of testing the legality of the Commissioners' requirement was by an action for a declaration or by defending proceedings for the enforcement of the penalties.

(1) [1911] 1 K. B. 410; [1912] 1 Ch. 158.

(2) [1911] 2 Ch. 139; [1912] 1 Ch. 173.

In these circumstances the Court considered that these were cases in which a declaration should be made that the requirements of the Commissioners were wholly unauthorized. But it has been pointed out in these and other cases that the discretion ought to be exercised with great care, and that the granting of a declaration is by no means a matter of course. Ought then the discretion to be exercised in the present case? It is to be observed that this is not a case in which the decision would govern great numbers of persons as in the two cases to which I have referred. It would no doubt affect any case which was similar to the plaintiff's, but the real question is whether the plaintiff's business or occupation is one which comes within s. 39 of the Act, and that question depends upon the circumstances of the particular case. Nor can it be said that the Commissioners are obviously doing something which they are not authorized to do; for the question whether the plaintiff is subject to the duty is one which may well be and has in fact been the subject of considerable discussion and some doubt. The plaintiff's contention involves the proposition that whenever the Commissioners require a return under s. 44 it is open to the recipient of the notice to commence an action for a declaration that his business or occupation is not one of those which are subject to the tax under s. 39 on the ground that there is a question of fact whether he is carrying on a business which comes within the scope of the section. On this basis the Commissioners could not without exposing the Crown to an action for a declaration require a return from any person unless the knowledge of the details of his business or occupation was such as to satisfy them that it came within s. 39. But in many cases it is quite impossible for them to have this previous knowledge. How without investigation of the books of the subject or information supplied by him could they, for instance, say what amount of capital was required for the purpose of his profession, or whether his profits are dependent mainly upon his personal qualifications, or whether his business is that of an agent whose remuneration consists wholly of a fixed sum not dependent on the amount of business done or any other contingency, or whether he takes commissions?

PETERSON J. 1919 SMEETON v. ATTORNEY-GENERAL.

The Legislature in passing this Act can hardly have contemplated that questions of this kind were to be removed from the consideration of the Commissioners who are the appropriate body for the purpose of investigating facts of this description. Nor can it be said that the question in this case can only be determined in an action of this sort. The plaintiff might have followed the course which has been adopted in other cases. He might have made a return and at the same time raised the question whether he was chargeable at all under the Act, and if the Commissioners decided against him he could have the question determined by the Court which deals with Revenue cases. If he preferred to insist upon what he considered to be his strict rights and refused to make a return, although he had the material for his income tax return available for the purposes of this return, he might have waited until the Commissioners assessed him in default of making a return and appealed from their assessment. This is the course which he seems to have favoured in March, 1917. In the last resort if the Commissioners, instead of doing this, sued him for penalties he might have resisted their claim.

In my opinion it is not desirable that cases of this character should be withdrawn from the Court which is constituted for the purpose of dealing with Revenue cases. I do not therefore propose to make the declaration for which the plaintiff asks. Taking as I do this view I abstain from expressing any opinion on the question whether the plaintiff is carrying on a trade or business which is subject to the provisions of the Act.

Solicitors: *Richardson, Sadlers & Callard; Solicitor of Inland Revenue.*

R. M.

[1920] 1 Ch. 99. SETTLEMENT TRUSTS. *In re* PAUL'S | *Followed. In re* PLAYFAIR, DECD. [1951] 1 Ch. 4

In re PAUL'S SETTLEMENT TRUSTS.

PAUL *v.* NELSON.

[1919 P. 582.]

P. O. LAWRENCE J.

1919

June 18; *July* 9, 10.

Settlement—Special Power of Appointment—Legacy upon Trusts of Settlement—Accretion or independent Settlement—Appointment for Life of One-half of Income of Trust Fund—Gift Over to a Class—Date when Class to be ascertained—Wills Act, 1837 (1 *Vict. c.* 26), *ss.* 1, 24.

P. on August 11, 1910, by deed settled funds on usual trusts for his daughter B. for life and her issue, with a gift over in default of her issue (which happened) for the children of his three other children on attaining twenty-one or marriage. The settlement empowered B. by deed or will to appoint one-half of the income of the trust funds in favour of any husband of hers who might survive her during his widowhood.

On the same day P. made his will and bequeathed the sum of 20,000*l.* to the persons who at his death should be the trustees of the settlement "to be held upon the trusts," etc., in such settlement declared concerning the property thereby settled, and so that such trusts, etc., should "take effect in relation to the said sum of 20,000*l.* in the same manner in all respects as if such sum had formed part of the property originally settled by such indenture." P.'s three other children were married, and at his death in 1917 he had several grandchildren.

B. died in 1918, and by her will made in 1912, after reciting the settlement, appointed one-half of the income of "the trust fund thereby settled" to her husband during his widowhood. The husband claimed one-half of the income of the whole of the trust funds, including the 20,000*l.*, and two of the grandchildren, who had attained twenty-one, claimed immediate payment of their respective shares in one-half of the capital of the whole of the trust funds:—

Held, that the effect of P.'s will was to make the legacy of 20,000*l.* an accretion to the funds originally settled by the deed of 1910 and not to create a new independent referential settlement of the legacy upon the same trusts and powers as in the original settlement declared, and therefore the husband was entitled under the appointment to one-half of the income of the whole of the trust funds including the 20,000*l.*

Held, also, that the class of grandchildren to take under the gift over did not close when the eldest grandchild attained twenty-one but remained open until the death of the husband, and therefore the two grandchildren who had attained twenty-one were not entitled to immediate payment of any part of the capital of the trust funds.

In re Faux (1915) 84 L. J. (Ch.) 873 followed on this point.

Held, also, that by virtue of ss. 1 and 24 of the Wills Act, 1837, the will of B. operated on the income of the whole of the trust funds including the 20,000*l.*

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ADJOURNED SUMMONS.

By deed dated August 11, 1910 (being a voluntary settlement), W. Paul settled stocks and securities to the value of about 16,000*l.* upon trust for his daughter Ann Bridgett (widow) for life, and after her death upon trust for her children or remoter issue as she should by deed or will appoint and in default of appointment for all her children who being male should attain the age of twenty-one years or being female should attain that age or marry, with a gift over in default of issue upon trust for the children of the settlor's three other children James Paul, Thomas Paul and Mary Motley, who being male should attain the age of twenty-one years or being female should attain that age or marry. The settlement also contained a power for Ann Bridgett " by deed or will to appoint unto or for the benefit of any husband of hers who might survive her an interest during his widowhood or any less interest " in any part of the trust fund not exceeding one-half part thereof " to commence from her decease and to be subject to such conditions as she may think fit."

On the same August 11, 1910, W. Paul made his will, and by clause 10 thereof bequeathed the sum of 20,000*l.* to the persons who at his death should be the trustees of the said indenture of settlement of August 11, 1910, " to be held upon the trusts and with and subject to the powers and provisions by and in such settlement declared and contained concerning the property thereby settled or such of the same trusts powers and provisions as may be then subsisting and so that such trusts powers and provisions shall take effect in relation to the said sum of 20,000*l.* in the same manner in all respects as far as the case will admit as if such sum had formed part of the property originally settled by such indenture."

The testator's three other children were married and had issue, and at the date of his death in June, 1917, he had seventeen grandchildren, two of whom had attained the age of twenty-one years.

Ann Bridgett had no issue by her first marriage, and in 1911 married the defendant John Nelson, and died in September, 1918, without issue. By her will, made on April 19, 1912, she

exercised the power of appointment given her by the settlement of 1910 as follows: "Whereas under a settlement dated the 11th day of August, 1910, and made between my father William Paul of the first part myself of the second part and my brothers Thomas William Paul and James Arthur Paul of the third part I have power to appoint to my said husband an interest during his widowhood in any part of the trust fund thereby settled not exceeding one-half part thereof to commence after my decease. Now therefore in exercise of the said power of appointment and of all other powers (if any) enabling me in that behalf I hereby direct and appoint that in the event of my said husband surviving me the trustees for the time being of the said settlement shall from and after my death stand possessed of the said trust fund upon trust to pay the income of one-half part thereof to my said husband during the residue of his lifetime or until his remarriage."

On the death of Mrs. Nelson a question arose whether her husband under the appointment made by her will was entitled to the income of one-half of the trust funds of the settlement of 1910, including therein the legacy of 20,000*l.*, or whether the appointment operated only on one-half of the income of the funds subject to the trusts of the settlement at the date of her will; and also a question as to the date when the class of grandchildren entitled under the gift over in the settlement was to be ascertained. A summons was issued to determine these and other questions. The plaintiff James Paul and the defendant William Paul were the present trustees of the settlement of 1910, and also the executors and trustees of the will of the testator and the residuary legatees under his will. No part of the testator's estate had been specifically appropriated to represent the legacy of 20,000*l.* but his estate was amply sufficient to pay it, and since his death his executors had paid interest thereon half yearly to Mrs. Nelson until her death.

C. J. Farwell for the plaintiff.

P. B. Lambert for the defendant Nelson. The legacy of 20,000*l.* is an accretion to the funds originally settled and

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follows their destination. It is not an independent fund settled by the will of the testator with referential trusts and powers similar to those of the settlement of 1881. It is impossible to give effect to the direction of the testator that the trusts of the settlement are to apply to the 20,000*l.* in all respects as if that sum had formed part of the property originally settled unless the legacy is added to the original trust funds. Therefore the appointment by Mrs. Nelson applies as well to one-half of the income of the 20,000*l.* as to one half of the income of the original trust funds. But if the legacy is an independent trust fund, her will is a clear exercise of her special power, and then the question is, what is the property upon which it operates ? By s. 1 of the Wills Act " a will " includes an appointment by will made in exercise of a power, and then s. 24 provides that every will, unless a contrary intention appears, is to be construed to speak from the death of the testator. In *Freme* v. *Clement* (1), which was a decision on s. 25 of the Wills Act, Jessel M.R. in his judgment after referring to ss. 1 and 24 of the Act states that the same rule of construction applies to a will made in exercise of a power as to a will not in exercise of a power. It is true that the decision of Jessel M.R. on s. 25 of the Act was disapproved of by the Court of Appeal in *Holyland* v. *Lewin* (2), but nowhere in their judgments do the Court of Appeal disapprove of the construction put by him on ss. 1 and 24 of the Act. It is submitted therefore that Mrs. Nelson's testamentary appointment, which is to be read into the original settlement, operates on the income of the whole of the trust funds including the 20,000*l.* There is no contrary intention here because she knew of her father's will, and left her will unaltered.

R. M. Pattisson for the two grandchildren who had attained twenty-one. Mr. Nelson does not take a life interest in one-half of the income of the 20,000*l.* The testator's will created a separate and independent settlement of the legacy with referential trusts and powers under which Ann Bridgett had a separate and independent power of appointment over one-half of the income of the legacy : *In re Walpole's Marriage Settle-*

(1) (1881) 18 Ch. D. 499, 507. (2) (1884) 26 Ch. D. 266.

ment. (1) It was a special power and there must be an intention to exercise it which can only be shown by reference to the power or to the subject-matter of the power: *In re Williams* (2); *In re Wells' Trusts.* (3) On the question of intention dates are to be regarded: *In re Hayes.* (4) In that case Byrne J. held that the will of a son made before the will of the father did not under the circumstances execute a special power conferred on the son by the will of the father who predeceased the son, and his decision was affirmed by the Court of Appeal. (5) Here the will of the father was made before the will of Mrs. Nelson and came into operation before her death, and raises the question left open by the Court of Appeal in *In re Hayes* (6), "whether it is possible, as a matter of law, to execute by anticipation a special power which has not been created till after the alleged execution." As to *Freme* v. *Clement* (7) it is submitted that the observations of Jessel M.R. are of doubtful authority, having regard to the judgment of the Court of Appeal in *Holyland* v. *Lewin.* (8) Lastly, if Mrs. Nelson's will could operate as an appointment of one-half of the income of the whole of the trust funds including the legacy, it is submitted that the actual language of her appointment shows a clear intention to appoint only one-half of the income of the original trust funds because, after reciting that by the settlement of 1910 she had power to appoint one-half of the income of "the said trust fund thereby settled" she appoints one-half of the income of "the said trust fund," language which it is submitted does not extend to include the income of subsequent accretions to the trust funds.

G. W. Knowles for an infant grandchild of the testator adopted the same line of argument.

H. S. Preston for the defendant William Paul representing possible unborn grandchildren of the testator. On the first question raised by the summons I support Mr. Lambert's argument. On the second question I shall contend that the class of grandchildren to take under the gift over is not

(1) [1903] 1 Ch. 928.
(2) (1889) 42 Ch. D. 93, 97.
(3) (1889) 42 Ch. D. 646.
(4) [1900] 2 Ch. 332, 337.
(5) [1901] 2 Ch. 529.
(6) [1901] 2 Ch. 532.
(7) 18 Ch. D. 499.
(8) 26 Ch. D. 266, 272.

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closed, but remains open until the death of the defendant Nelson.

P. O. LAWRENCE J. stated the facts and continued: On Mrs. Nelson's death in September, 1918, leaving her husband her surviving, the appointment in his favour contained in her will became operative, and the question arises whether that appointment extends to a moiety of the income of the 20,000*l.* legacy. In my judgment the solution of this question depends upon whether the true effect of the testator's will was to make that legacy an accretion to the funds originally settled by the settlement of August 11, 1910, or was to create another settlement with referential trusts so as to make the legacy an independent trust fund subject to new trusts and powers declared and created by his will. In my judgment the true effect of clause 10 of his will is to make the 20,000*l.* legacy in all respects an accretion to the trust funds originally settled by the settlement of August 11, 1910. The testator does not say that the legacy is to be held on similar or even upon the same trusts as are declared by that settlement, but bequeaths it to the trustees of the settlement upon *the* trusts and with and subject to *the* powers and provisions therein declared concerning the trust funds thereby settled; and then, to place his meaning beyond doubt, he adds that the trusts and powers of the settlement are to take effect in relation to the legacy in all respects as if it had formed part of the property originally settled. In my opinion the testator could hardly have used clearer words in which to express his intention to make the bequest operate so that the legacy should form part of the trust fund settled by the settlement and should not form an independent trust fund settled by his will. The appointment contained in the will of Mrs. Nelson operates by virtue of the power in the settlement of August 11, 1910, and being a special power her execution of it has to be read into and derives its force from that settlement. See per Lord Selborne in *Holyland* v. *Lewin.* (1) The effect of this, in my opinion, is that from and after Mrs. Nelson's death the settle-

(1) 26 Ch. D. 266, 271.

ment must for all purposes be read as if it had contained a trust to pay a moiety of the income of the trust fund thereby settled to the defendant Nelson during widowhood. Now " the trust funds thereby settled " had, as I have already held, become increased on the death of the testator so as to include the legacy of 20,000*l.*, and the appointment by Mrs. Nelson in my opinion operates upon the income of a moiety of the whole trust fund. The legacy of 20,000*l.* may I think be likened to any other increase of original trust funds: for instance, an increase resulting from an issue of bonus shares in respect of investments forming part of the funds originally settled. Moreover, I think that Mr. Lambert's argument that ss. 1 and 24 of the Wills Act apply so as to include this legacy is sound. Even if on the construction of Mrs. Nelson's will the appointment was held to be confined to a moiety of the income of the trust funds as originally settled, I think that by virtue of the words of clause 10 of the testator's will the legacy would still have to be held upon the same identical trusts as the funds originally settled were then being held, and the same result would follow. From what I have said it follows that in my judgment the defendant Nelson takes a moiety of the income of the legacy as well as a moiety of the income of the trust fund originally settled. If I were to hold otherwise, I would not I think be giving effect to the testator's direction that the trusts of the settlement should take effect in relation to the legacy of 20,000*l.* in the same manner in all respects as if such legacy had formed part of the property originally settled. In spite of Mr. Pattisson's forcible argument to the contrary I am of opinion that this is not a case of an execution by anticipation of a special power which has not been created until after the alleged execution, and I therefore need not consider the possibility of such an execution of a special power, a question which was left open by the Court of Appeal in *In re Hayes.* (1) In my judgment the testator did not purport to create any fresh power of appointment over the 20,000*l.* but intended to subject that sum to the existing power created by the settlement. I will therefore make a declaration

(1) [1901] 2 Ch. 529, 532.

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that, upon the true construction of the settlement and of the will of the testator, the defendant John Nelson is entitled under the appointment made by the will of his late wife during his life or until remarriage to one moiety of the income of the funds now subject to the trusts of the said settlement including therein the sum of 20,000*l.* bequeathed by the will of the testator to the trustees of the settlement.

The second question was then argued.

P. B. Lambert for the defendant Nelson took no part in the argument.

R. M. Pattisson for the two grandchildren who had attained twenty-one. Where there is a gift to a class the members of which are entitled to payment on attaining twenty-one, on the first member attaining twenty-one the class closes: *Andrews* v. *Partington* (1); *In re Emmet's Estate* (2); *In re Deloitte.* (3) Here the class of grandchildren to take closed on the first grandchild attaining twenty-one and after born grandchildren are excluded. Therefore each of the two grandchildren who has attained twenty-one is entitled to immediate payment of one-seventeenth of one-half of the capital of the trust funds, and is also entitled to a similar share in the other half of the trust funds subject to the interpolated life interest therein of the defendant Nelson. There is no reason for distinguishing between the two parts of the fund. The exercise of the power only postpones the payment of one-half of the fund until the death of the life tenant: Farwell on Powers, 3rd ed., § 56, p. 311.

[P. O. LAWRENCE J. Is there no reported case of a gift over to a class where there is a life interest in part of the fund?]

H. S. Preston referred to *In re Faux.* (4)

R. M. Pattisson. That case is distinguishable. There a testator's residuary estate was given upon trust to pay the income to the testator's two sons in equal moieties for life and subject thereto to pay the capital to their children at twenty-one or marriage. Both the sons survived the testator and

(1) (1791) 3 Bro. C. C. 401.
(2) (1880) 13 Ch. D. 484.
(3) [1919] 1 Ch. 209, 213.
(4) 84 L. J. (Ch.) 873.

had children. One of the sons subsequently died and it was held that the class did not close until the death of the son who was still alive. Here there is a gift of a fund in the first instance to a class on the death of Mrs. Bridgett and a life interest interposed by appointment in one-half of the income of the fund.

G. W. Knowles for an infant grandchild argued to the same effect.

H. S. Preston for possible unborn grandchildren was not called upon.

P. O. LAWRENCE J. I think the judgment of Astbury J. in *In re Faux* (1) governs the point now before me and I shall follow it without expressing any opinion of my own. I hold therefore that the class of grandchildren remains open until the death of the defendant Nelson.

Solicitors for all parties other than the defendant Nelson: *Smiths, Fox & Sedgwick, for Ford & Warren, Leeds.*

Solicitors for the defendant Nelson: *Petch & Co., for E. P. Cross, Harrogate.*

(1) 84 L. J. (Ch.) 873.

H. L. F.

WRIGHT, *Re.* ([1920] 1 Ch. 108; 121 L.T. 549). *Observations of* P. O. LAWRENCE, J. ([1920] 1 Ch. 117; 121 L.T. 552) *approved.* *Re* CRAWSHAY .. .. .. [1948] 1 All E.R. 107

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April 30; *June* 17; *July* 16.

In re WRIGHT.

HEGAN *v.* BLOOR.

[1918 W. 1113.]

Settlement—Special Power—Power exercised—Fraud on Power—Motive—Evidence—Admissibility.

In 1881 the balance of a legacy and certain investments were settled upon trust for W. for life and, after her death, upon trust as to the balance of the legacy for such persons as she should by deed or will appoint, and as to the investments for her blood relations as she should in like manner appoint, and in default of appointment for her next of kin.

By her will made in January, 1917, W. gave the balance of the legacy, describing it as "the only part of my money I can leave to other than blood relations," to certain persons. She then gave pecuniary legacies to several persons who were some of her blood relations, including 50*l.* to her sister and 600*l.* to each of her two nephews sons of her brother Robert, and directed the residue of her "money" other than the aforesaid balance of the legacy to be equally divided between her sister and her said two nephews.

W. died in July, 1917, and questions arose as to whether her will executed her special power and, if it did, whether her will was a fraud on the power to the extent of the benefits conferred on the two nephews. There was no evidence of a fraud on the power other than a letter written by W. in 1911 to her two nephews in which she in effect stated that in 1891 she verbally agreed with her brother Robert to appoint 2000*l.* to him or his family on condition that he paid her an annuity of 80*l.* per annum, and expressed her intention of carrying out the bargain :—

Held, that the will sufficiently referred to the special power and to the subject matter of the power, and operated as an execution of the power.

Held, also, that the letter was admissible in evidence to show the motive which actuated W. in making the appointments to the two nephews, that the onus was on them to show that she had abandoned her improper motive when she made her will, that the onus was not discharged, and therefore the appointments to them were a fraud on the power.

The principle of *Humphrey* v. *Olver* (1859) 28 L. J. (Ch.) 406 applied.

ADJOURNED SUMMONS.

By deed dated November 29, 1881, and made between Marian Wright (then Marian Cole, widow) of the first part, the Rev. H. Press Wright of the second part, and trustees of the third part (being the settlement executed on the marriage

of the said Marian Wright and H. Press Wright), a sum of 887*l.* 10*s.* balance of a legacy of 1000*l.*, and also certain investments of the nominal amount of about 2400*l.*, were settled upon trust for Marian Wright for life without power of anticipation, and on her death, as to the said sum of 887*l.* 10*s.* upon trust for such person or persons and in such manner as she should whether covert or discovert by deed or will appoint, and as to the residue of the said trust premises upon trust for such of her blood relations as she should at any time or times thereafter in like manner appoint, and in default of such appointment upon trust for her statutory next of kin as if she had never been married and had died intestate.

There were no children of this marriage.

H. Press Wright died in September, 1892.

Marian Wright died in July, 1917, and by her will dated January 31, 1917, after appointing the plaintiffs her executors, gave "from the balance of 1000*l.* left me by an aunt by marriage the only part of my money I can leave to other than blood relations" pecuniary legacies to several persons, not blood relations. The testatrix then gave the following legacies to persons who were blood relations, "to my sister Emily Punch the sum of 50*l.*, to Emily Maud Rawson the sum of 50*l.*, to my nephew (the plaintiff) George Vincent Hegan the sum of 125*l.* I give to Underwood Fisher and Charles Dickinson Fisher 600*l.* each, to Emily Spotewood 100*l.*, children of my late brother Robert Harry Underwood Fisher," and the testatrix desired that the residue of her "money other than the aforesaid balance of 1000*l.*" should be equally divided between the said Emily Punch, Underwood Fisher and Charles Dickinson Fisher.

The testatrix died in July, 1917, and the plaintiffs proved her will. The gross value of her estate was 81*l.* 9*s.* 3*d.* The testatrix had in 1885 by deed irrevocably appointed the 887*l.* 10*s.* in favour of certain persons, so that at her death there was not any balance of a sum of 1000*l.*, nor any funds over which she had a power of appointment other than the investments over which she had a power of appointment under the settlement of 1881 in favour of blood relations,

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and the value of these investments at her death was about 1850*l.*

The next of kin of the testatrix were numerous.

The plaintiffs, who were also the present trustees of the settlement of 1881, issued a summons to determine (1.) whether the will of the testatrix duly exercised the power of appointment in favour of her blood relations; and (2.) if it did, whether the appointments to the defendants Underwood Fisher and Charles D. Fisher were void as being a fraud on the power.

The circumstances which gave rise to the second question were these. Among the papers of the testatrix the plaintiffs found three letters all written in the year 1911. The first letter dated September 17, 1911, was written by Underwood Fisher and Charles Fisher to the testatrix. They wrote as executors of their late father, Robert Fisher, who died in 1910, and asked the reason why their father had included in the list of his properties "Legacy on Mrs. H. Press Wright's death as promised by her say 2300*l.*" In her reply dated October 9, 1911, the testatrix stated that in the spring of 1891 her husband, H. Press Wright, verbally arranged with her brother Robert Underwood Fisher "that he (your father) should give me 80*l.* a year on condition that I, Marian L. Wright, should on my death bequeath him or some of his family by will 2000*l.*," that she reluctantly acquiesced in this arrangement as she had other intentions as to others of her blood relations, and that their father most regularly paid her the 80*l.* quarterly up to the time of his death, and had she understood by his will bequeathed her an annuity of 80*l.* payable quarterly for the remainder of her life, and the testatrix continued "as to the legacy I bequeath to you my dear brother's children that is all settled in my will and has been for many years and nothing can alter that. Had I died a year only after the agreement between your father and my late husband Archdeacon Wright was made, he (your father) would of course have inherited the whole sum of 2000*l.*, so of course I am entitled to the 80*l.* a year as long as I live." The third letter dated December 5, 1911, was from Underwood

Fisher to the testatrix, in which he thanked her for her letter of October 9, 1911, and stated in effect that the annuity of 80*l.* per annum bequeathed to her by the will of his father would be punctually paid, as in fact it was.

E. F. Ball for the plaintiff.

F. Watmough for the defendant Bloor, one of the next of kin not mentioned in the will. It is submitted that the testatrix has not exercised her special power of appointment. The intention to exercise it must be shown by express reference to the power or by reference to the subject-matter of the power: Hawkins on Wills, 2nd ed., p. 35; *Nannock* v. *Horton* (1); *Jones* v. *Tucker* (2); *In re Huddleston.* (3) Here there is no reference to the special power or to the subject-matter of the power unless the words "the residue of my money other than the aforesaid balance of 1000*l.*" impliedly include personal estate over which she had a special power of appointment. The investments therefore go as in default of appointment. But if the will exercises the special power, then I submit that the appointments in favour of the defendants Underwood and Charles Fisher are a fraud on the power.

C. Church for Emily Punch. It is to my interest to contend that the will executes the special power; and if it does, then I contend that the will is a fraud on the power to the extent of the benefits given to the defendants Underwood and Charles Fisher. In the first place, although there is no direct reference to the special power, there is a clear reference to the subject-matter of the power which shows that the testatrix could not have given the legacies in the latter part of her will to persons, all of whom were blood relations, without having intended to comprehend the subject-matter of the power *Hales* v. *Margerum* (4), and there is also the reference to her blood relations in the first part of her will. Secondly, the letters of 1911 are an admission of the circumstances under which she exercised the power.

[P. O. LAWRENCE J. The letter of October 9, 1911, is

(1) (1802) 7 Ves. 391.
(2) (1817) 2 Mer. 533.
(3) [1894] 3 Ch. 595.
(4) (1796) 3 Ves. 299, 300.

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written six years before the date of her will. How is that evidence ?]

She says in it that she had made a bargain with her brother Robert which could not be altered, and it is admissible as evidence of her state of mind and intention at that time to fulfil the bargain she had made: *Lloyd* v. *Powell Duffryn Steam Coal Co.* (1) There seems to have been an earlier will which must have been destroyed, but the letter is admissible as part of the res gestæ, notwithstanding it was written more than six years ago, to show the circumstances under which her last will came to be executed. She continued to receive the annuity up to her death and it is impossible to divorce from her last will the corrupt bargain she had made. The donee of a special power must fairly and honestly execute it for the end designed: Farwell on Powers, 3rd ed., pp. 457–8, and cases there cited. Here the appointor accepted a bribe and ceased to be a free agent, and her corrupt bargain vitiates her exercise of the power: *Rowley* v. *Rowley* (2); *In re Marsden's Trusts.* (3) The two sons were no doubt innocent of the fraud, but they must show that she repudiated the corrupt bargain and had abandoned her improper motive at the time she made her will: *Humphrey* v. *Olver.* (4)

G. M. Hildyard for the defendants Underwood and Charles Fisher. In order to exercise a special power it is not necessary to refer to the power expressly. It is enough if you can find from a consideration of the whole will an intention to exercise the power: *In re Ackerley.* (5) Here the testatrix does not say " I appoint," but the words " the only part of my money I can leave to other than blood relations " is an obvious reference to a settlement which restricts her powers of disposition and shows that she is referring to a settlement under which her blood relations are interested, and it is impossible to read the latter part of the will without seeing that in the gift of legacies to persons all of whom are blood relations she is purporting to deal with funds over which she has a power

(1) [1914] A. C. 733, 751.
(2) (1854) Kay, 242, 262.
(3) (1859) 4 Drew. 594, 600.
(4) (1859) 28 L. J. (Ch.) 406.
(5) [1913] 1 Ch. 510, 514.

of appointment. Therefore the will is a good exercise of her special power and the appointment to my clients is valid. It is said that the appointment is a fraud on the power, but there is no evidence of any fraud other than the letter of October 9, 1911, which I submit, having regard to its date, is not admissible as evidence of intention either against the testatrix or my clients. It is not part of the res gestæ. It is not an admission by her against interest, and it is not an admission by her of any bargain in fraud of the power. If it were written at the time the appointment was made it would be. My clients are objects of the power, and the mere fact that there was a bargain in 1891, which was bad and which she was not bound to carry out, does not necessarily invalidate an appointment to the same objects in 1917. They do not claim through the testatrix but under the original settlement, and the letter is not admissible in evidence against them. The primary intention was to give 2000*l.* to the brother or to his children. But she did not appoint that sum and gives other blood relations a large share. If she realized that she was perfectly free and nevertheless appointed 600*l.* to each of the sons, that would be good. The onus is on the parties entitled in default of appointment to show that the appointment was made in pursuance of a corrupt bargain, and it is submitted that they have failed.

C. Church on the admissibility of the letter as evidence referred to Taylor on Evidence, 10th ed., vol. i., s. 338.

Cur. adv. vult.

July 16. P. O. LAWRENCE J. This summons raises two questions for determination by the Court—namely, first, whether the testatrix has in fact exercised a special power of appointment conferred upon her by her marriage settlement; and secondly, if she has, whether in so far as she has exercised such power in favour of the defendants Underwood Fisher and Charles Dickinson Fisher such exercise was not a fraud on the power and therefore void.

The first question depends upon the construction of the will of the testatrix. By a settlement made in 1881 on the marriage

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of the testatrix certain trust funds were settled in trust for the testatrix for life and after her death, as to part of the trust funds consisting of the balance of a legacy of 1000*l.* therein mentioned, upon trust for such persons as the testatrix should by deed or will appoint, and as to the residue of the trust funds upon trust for such of the blood relations of the testatrix as she should in like manner appoint, and in default of appointment upon trust for her next of kin. By her will dated January 31, 1917, the testatrix in the first place disposed of the balance of the 1000*l.* legacy—describing such balance as "the only part of my money I can leave to other than blood relations"—in favour of certain persons therein named. She then proceeded to give certain legacies to blood relations (including a legacy of 600*l.* to each of her nephews the defendants Underwood Fisher and Charles Dickinson Fisher, who were described in the will as children of her late brother Robert Underwood Fisher), and concluded her will by expressing her desire that after her death and funeral expenses were paid the residue of her money, other than the balance of the 1000*l.* legacy, should be equally divided between her sister Emily Punch and the defendants Underwood Fisher and Charles Dickinson Fisher. As a matter of fact the testatrix had by a deed, executed many years before the date of her will, appointed the balance of the 1000*l.* legacy in favour of certain other persons, and therefore her will in so far as it purported to exercise the general power of appointment conferred upon her over the balance of the 1000*l.* legacy was inoperative. This fact however does not affect the construction of her will. The testatrix at the date of her will and of her death had practically no property of her own, but I think that (regard being had to the authorities on this point) it is doubtful how far this fact ought to be taken into consideration in determining whether her will operated as an exercise of the special power. Apart however from this fact I have come to the conclusion that the will of the testatrix did operate as an exercise of the special power both as to the legacies and as to the residue given by her to her blood relations. The will is divided into two parts. In the first part the testa-

trix deals with the balance of the 1000*l.* legacy in favour of persons not being blood relations. In the second part the testatrix makes bequests solely in favour of blood relations. In my opinion the statement by the testatrix in her will that the balance of the 1000*l.* legacy was the only part of her money which she could leave to other than blood relations is a sufficient reference to the special power and sufficiently indicates that in making the bequests in favour of her blood relations she intended to exercise her special power of appointment. Such statement in my opinion also shows that the testatrix had in view the subject-matter of the special power when making the bequests in favour of her blood relations and sufficiently indicates that she intended such bequests to operate upon and to be satisfied out of that part of the trust funds comprised in the settlement of 1881, over which she had the special power. In answer to the first question, therefore, I propose to make a declaration that the will of the testatrix operated as an exercise of the special power of appointment conferred upon her by the settlement of 1881, both as regards the legacies and as regards the residue bequeathed in favour of her blood relations therein named.

I now come to the second question. The relevant facts are shortly these. From the year 1891 down to his death in the year 1911, Robert Harry Underwood Fisher, a brother of the testatrix, made the testatrix an allowance of 80*l.* a year. By his will he bequeathed to the testatrix an annuity of 80*l.* which she duly received from the date of her brother's death down to the date of her own death. Shortly after the death of Robert Harry Underwood Fisher, his two sons, the defendants Underwood Fisher and Charles Dickinson Fisher (who were the executors of his will) wrote the testatrix to ask her the meaning of the following item appearing in their father's written directions to his executors—namely, "Legacy on Mrs. H. Press Wright's death as promised by her, say 2300*l.*" This inquiry evoked a letter from the testatrix dated October 9, 1911, in which the testatrix in effect stated that in the spring of the year 1891 she had verbally agreed with her brother that he should give her 80*l.* a year on condition that

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she would on her death appoint to him or to some of his family the sum of 2000*l.* out of that part of the trust funds comprised in the settlement of 1881 over which she had a special power of appointment in favour of her blood relations. The testatrix died on July 18, 1917, having by her will dated January 31, 1917 (as I have already held), exercised her special power of appointment by appointing (inter alia) a legacy of 600*l.* and a share in the residue to each of her nephews the defendants Underwood Fisher and Charles Dickinson Fisher. There is no evidence of the bargain which the testatrix says she had made with her brother other than such evidence, if any, as is afforded by the letter of October 9, 1911.

The defendants Underwood Fisher and Charles Dickinson Fisher contend that the letter of October 9, 1911, is not admissible in evidence against them and that the appointment to them is valid. In my opinion the appointees may be right in their contention to this extent that the letter is not admissible against them as evidence that the alleged bargain was in fact made. It is argued on their behalf that the statements in the letter amounted at most to admissions by the testatrix which could have been used against her if she had at any time denied the bargain but that as such admissions are not admissions against interest they are not admissible in evidence against them. The next of kin have not seriously contended that the letter is admissible on the ground that it contains admissions against interest, consequently I prefer not to express any opinion on this point but propose to deal with the case as if the letter were not admissible on the ground that it contains admissions against interest. The main contention of the next of kin however is that in order to invalidate the appointment it is not essential for them to prove that such a bargain was in fact made. They say that it is sufficient for them to prove an improper motive inducing the appointment, and that the letter contains evidence that the appointor was actuated by an improper motive in making the appointment and is on that ground admissible. In order to determine the question which thus arises I think it necessary to have clearly in

mind what it is that the next of kin have to prove in order to establish that the appointment is void as a fraud on the power. The most common case of a fraud on a power is where a donee of a special power of appointment makes an appointment intended to benefit himself or some other person not an object of the power. In such a case the execution of the power is corrupt and void because the power is not exercised bona fide for the end designed. It is I think important to bear in mind that in such cases it is not necessary to prove a bargain between the donee of the power and the appointee. See per Lord Parker in *Vatcher* v. *Paull.* (1) What the Court looks to is the intention or purpose of the appointor in making the appointment, and if it can be shown that the intention or purpose of the appointor was such that, if it were carried out, it would operate as a fraud on the donor of the power in the sense of benefiting some person not an object of the power the Court will avoid the appointment although the appointee was no party to and did not know of the corrupt intention or purpose and although the corrupt intention or purpose in fact fails to take effect. In such a case what has to be proved is the intention of the appointor at the time when the power was exercised, which frequently necessitates evidence being given as to the state of mind of the appointor at that date. It is well established that the words as well as the acts of a person are admissible as evidence of his state of mind. See per Lord Moulton in *Lloyd* v. *Powell Duffryn Steam Coal Co.* (2) In the cases to which I have alluded the vice of the appointment consists of the intention and purpose of the appointor that the appointment when made should in some way operate for the benefit of the appointor or of some other person not an object of the power. But there are other cases in which a corrupt or improper motive without any such intention or purpose will undoubtedly vitiate an appointment made in exercise of a special power. In cases where it is not suggested that the donee of a special power has exercised the power with the intention of benefiting himself or some other person not an object of the power the Court

(1) [1915] A. C. 372, 378. (2) [1914] A. C. 733, 751.

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will not as a rule examine into the motive which may have induced the donee to exercise the power in favour of a particular object of the power. The donee is entitled to prefer one object to another from any motive he pleases, and however capriciously he exercises the power the Court will uphold it. But in my opinion this rule does not apply where the motive is corrupt or improper even although the appointment is made in favour of an object of the power and the intention and purpose of the appointor is that the appointee should take the whole of the appointed fund unconditionally for his own benefit. An example of such a corrupt or improper motive, where the intention and purpose of the appointment itself cannot be said to be otherwise than in accordance with the end designed by the donor of the power, is to be found in the case of a bribe being given or promised to the donee of the power in order to induce him to make an appointment in favour of one of the objects of the power to the exclusion or detriment of the others. See per Wood V.-C. in *Rowley* v. *Rowley*. (1) Any such appointment would in my judgment be void even although the bribe were given or promised by a third party and without the knowledge of the appointee. In such a case moreover I do not think that in order to avoid the appointment it is essential to prove that a bribe has in fact been given or promised. In my judgment it is sufficient if it can be shown that the donee of the power had made the appointment in consequence of a bribe which he alleges has been given or promised to him. If it is once proved that the appointment is made in pursuance of an alleged bribe, the motive inducing the appointment ought in my opinion to be held improper without pausing to inquire whether the allegation by the appointor that the bribe was given or promised is or is not true in fact. Take the case of a testator having a special power to appoint by will and making a will reciting that in consideration of a money payment made to himself he had agreed to appoint the fund to one of the objects of the power to the exclusion of the others and then making an appointment in favour of that object expressly stating it was

(1) Kay, 242, 262.

made in pursuance of the recited agreement. In such a case the Court would not in my opinion go into the question whether the recited agreement had in fact been made or not but would hold the appointment to be void even though it could be shown that no such agreement had in fact been made. If that is the right conclusion in such a case, the further question arises whether it makes any difference if the donee of the power, instead of stating the improper motive in the instrument exercising the power, states it in a separate document or by word of mouth. In my judgment it does not. The principle is the same although in such a case evidence dehors the instrument exercising the power will have to be given to prove the improper motive. I have not been referred to, nor have I been able to find any reported case in which the Court has set aside an appointment made in exercise of a special power on proof that it was made in consequence of an alleged bribe where there is no evidence that such a bribe was in fact given or promised. I have come to the conclusion however that in principle the Court ought to set aside such an appointment if it is satisfied that the appointor made the appointment under the belief that he was bound by a corrupt bargain or even without any evidence as to his belief if the appointor states that he had made such a bargain and that he intended to carry it out and then makes an appointment in accordance with it. If, as I think, the true test of the validity of an appointment made in exercise of a special power is whether the appointor has or has not exercised the power bona fide for the end designed I am of opinion that evidence of the state of mind of the appointor at the time he made the appointment going to show his motive and intention in making the appointment is admissible as well in a case in which the appointment is challenged on the ground that it is made from a corrupt motive although intended for the exclusive benefit of an object of the power as in a case in which the appointment is made with the intention or purpose that the appointor or some person not an object of the power should derive some benefit from the appointment: and further, that statements made by the appointor as to his motives and intentions are admissible

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as well in the one case as in the other. It follows from what I have said that in my opinion if it is proved that an improper motive is the avowed reason for making the appointment it vitiates the appointment whether the appointor had or had not good cause to be actuated by such a motive and whether the appointees knew of the motive or not.

In the result for the reasons I have stated I hold that the letter of October 9, 1911, is admissible. Now when this letter is looked at, it in my opinion clearly shows that the writer considered herself bound by a bargain to execute the special power of appointment conferred upon her by the settlement of 1881 in favour of her brother or of some members of his family to the extent of 2000*l.* in consideration of her brother making her an allowance of 80*l.* a year. It also shows her fixed determination at that time to carry out her part of the bargain. There was no evidence to show that her belief in the existence of the bargain was unfounded and it is not suggested, much less proved, that the payment and bequest by her brother of the 80*l.* annuity is attributable to any other cause than the alleged bargain. It is argued however that, even if that be so, the letter only shows the state of mind of the writer at the time it was written in October, 1911, and that it is not evidence of her state of mind in January, 1917, when she made her will exercising the power. It is further argued that the appointment which she made to the two defendants was not in accordance with the bargain stated in the letter to have been made by her and therefore ought not to be held to have been made in pursuance of it. In my judgment both these points are covered in principle by the decision of the Court of Appeal in *Humphrey* v. *Olver*. (1) In that case it was held that if a corrupt intention is shown to have ever been entertained the burden of showing that it was abandoned previously to the execution of the power lay upon those who supported the appointment. It is true that *Humphrey* v. *Olver* (1) was a case in which the corrupt intention said to have been entertained was an intention that the donee of the power should benefit by the appointment, but as in my

(1) 28 L. J. (Ch.) 406.

opinion the state of mind of the appointor when making the appointment is the relevant fact, both in such a case and in a case like the present, I think that the principle of that decision applies to the facts of this case. The only fact relied upon on behalf of the appointees as showing that the appointor had in 1917 abandoned her improper motive is that the benefits appointed to the members of her brother's family do not amount in value to 2000*l*. In my opinion this, if true, does not afford the requisite proof of an abandonment by the appointor of her corrupt motive. The exact value of the investments representing the trust funds subject to the special power at the date of the appointor's will has not been proved. So far as I can judge, the value of the funds appointed to the members of the brother's family if the investments had stood at par would have approximated 2000*l*. In any event the amounts appointed to the defendants Underwood Fisher and Charles Dickinson Fisher are far greater in value than any sum or share appointed to any of the blood relations mentioned in the will, and there are a number of blood relations who have been excluded altogether. For the reasons above stated I hold that the appointment as regards the defendants Underwood Fisher and Charles Dickinson Fisher is void as being a fraud on the power and I propose to make a declaration accordingly.

Solicitors: *Hughes, Hooker & Co.; Michael Abrahams, Sons & Co.*

H. L. F.

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[1919. L. 455.]

Will—Bequest to Married Woman living apart from her Husband—Proviso by Way of Limitation or upon Condition—Public Policy.

A testator, who was living apart from his wife and was living with M. S., a married woman who had been deserted by her husband, bequeathed to M. S. provided she was living with him (the testator) at the time of his death an annuity of 750*l.* "provided and so long as she shall not return to live with her husband and provided and so long as she shall not remarry and subject to her leading a clean moral and respectable life in the opinion of my executors and trustees": in the event of M. S. remarrying or returning to live with her husband the testator reduced her annuity to 250*l.* per annum:—

Held, that the bequest was a limitation and not upon a condition, and was therefore valid.

Held, also, that the bequest was not void as being contrary to the policy of the law, for that its object was not to induce M. S. to continue to live apart from her husband and not to remarry but to maintain her until she returned to her husband or remarried.

In re Moore (1888) 39 Ch. D. 116 distinguished.

In re Charleton [1911] W. N. 54 followed.

Adjourned Summons.

V. S. Lovell, who was living apart from his wife, by his will dated September 25, 1918, after appointing the plaintiffs his executors and trustees, gave an annuity to the defendant Mabel Southall in the following terms: "I direct my executors and trustees to pay to the said Mabel Southall (providing that she is living with me at the time of my death) during her life by equal quarterly payments on the usual quarter days an annuity of seven hundred and fifty pounds (750*l.*) a year provided and so long as she shall not return to live with her present husband and provided and so long as she shall not remarry and subject to her leading a clean, moral and respectable life according to the opinion of my executors and trustees. In the event of the said Mabel Southall remarrying or returning to live with her husband, I direct my executors and trustees to pay her an annuity of two hundred and fifty (250*l.*) only."

The testator gave his residuary estate to his legitimate children who were infants.

Mabel Southall was married in 1908. In June, 1914, she commenced proceedings for divorce against her husband and on January 11, 1915, she obtained a decree nisi with the custody of her child upon the grounds of her husband's adultery and desertion. In the same year she went to live with the testator, with whom she subsequently cohabited, with the result that the King's Proctor intervened in the divorce proceedings and the decree nisi was set aside on December 10, 1915. She continued to live with the testator down to the date of his death and had a child by him who was born in July, 1916. The testator died in February, 1919. The summons was issued by the plaintiffs to determine (amongst other questions) the validity of the above bequest to Mabel Southall.

Galbraith K.C. for the plaintiffs.

Owen Thompson K.C. and *H. Johnston* for the residuary legatees. The first question is whether the proviso annexed to the gift is a limitation or a condition. If it is a limitation it is good, but if it is a condition it is bad and can be rejected and the annuity remain unaffected: *Brown* v. *Peck* (1); *Wren* v. *Bradley* (2); *Heath* v. *Lewis* (3); *In re Moore.* (4) It is submitted it is a limitation. But the object of the provision being to induce the wife not to return to her husband the entire gift fails as being against public policy: *In re Moore* (5); *Cartwright* v. *Cartwright.* (6) It is difficult to deduce a principle from the authorities, but it is submitted that the Court will not allow parties to contemplate and provide for a future separation nor uphold a gift contingent on the continued separation of husband and wife where the continued separation is induced by the gift. The converse case to the present is *In re Hope Johnstone* (7) where the gift was held to conduce to morality and the authorities are considered. *In re Charleton* (8) will be cited against us, but it is not a very

(1) (1758) 1 Eden, 140.
(2) (1848) 2 De G. & Sm. 49.
(3) (1853) 3 D. M. & G. 954.
(4) 39 Ch. D. 116.
(5) 39 Ch. D. 116, 128.
(6) (1853) 3 D. M. & G. 982, 988–9.
(7) [1904] 1 Ch. 470, 474, 477.
(8) [1911] W. N. 54.

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satisfactory decision and is also distinguishable. There a father was providing for his married daughter who had been deserted by her husband. Here the provision is for a mistress who is a married woman, and allowing that the testator had a moral obligation toward her it is submitted the true inference is that his dominant motive and object was, not the fulfilment of a mere moral obligation to make some provision for her, but to keep the husband and wife apart and to prevent a reconciliation. The gift being also contingent on her continuing to live with him until his death supports this view, and so does the reduction of her annuity in the event of her returning to her husband. If the husband sought a reconciliation she would say " No. I have 750*l.* a year and I will not return to you."

Jenkins K.C. and *Dighton Pollock* for Mabel Southall. We rely on *In re Charleton.* (1) Assuming this bequest is a limitation and not a condition it is not contra bonos mores. It is a provision for the lady during her separation and until she is reconciled to her husband or remarries. The distinction between this case and *In re Moore* (2) is that the bequest in that case provided for the future separation of the spouses. It is well settled that provision in separation deeds for the husband and wife to live apart and not to take proceedings for restitution of conjugal rights are not contrary to public policy : *Clark* v. *Clark* (3) ; *Wilson* v. *Wilson.* (4) That being so, it is a delicate question how far public policy prevents a testator from providing for one or other of the spouses during separation, and the principle should be applied with caution. There is nothing in this bequest that is against the policy of the law. The proviso " if she is living with me at the time of my death" does not introduce any illegality. The annuity only commences at the death, and the case is more like *Shewell* v. *Dwarris.* (5) The decision in *In re Moore* (6) is not relevant unless the intention was to prevent reconciliation, but here the testator was under a

(1) [1911] W. N. 54.
(2) 39 Ch. D. 116, 128.
(3) (1885) 10 P. D. 188.
(4) (1848) 1 H. L. C. 538.
(5) (1858) John. 172.
(6) 39 Ch. D. 116.

moral obligation to provide for this lady, and the true inference is that his intention was to maintain her during her separation and not to prevent reconciliation.

Cartwright v. *Cartwright* (1) was a case of future separation and the judgments all turn upon the difference between provisions for existing and for future separation. The observations on the policy of the law in *In re Borwick's Settlement* (2) are in point. The mere fact that the bequest may have a tendency to induce continued separation is not against the policy of the law.

Ward Coldridge K.C. and *R. M. Pattisson* for the testator's widow took no part in the arguments.

July 30. P. O. LAWRENCE J. The first question arising for determination on this summons is as to the validity of a bequest contained in the testator's will of an annuity of 750*l.* to the defendant, Mabel Southall. The bequest is in the following words. [His Lordship stated the will and the material facts and continued:] In these circumstances Mr. Owen Thompson and Mr. Henry Johnston contend, first, that the bequest is a limitation and not a bequest upon a condition; and secondly, that the object of the bequest was to induce Mabel Southall to continue to live apart from her husband and that therefore the bequest is void as being contrary to the policy of the law. In my opinion the first of these contentions is right. Upon the true construction of the will I think that the effect of the bequest is to limit the annuity of 750*l.* during such a period as Mabel Southall should live apart from her husband or should not remarry and not to give the annuity to her for life subject to a condition that it should cease if she should return to her husband or remarry. This being in my judgment the true effect of the bequest it follows that, if the second contention can be established, the whole bequest will be void as it is not a case in which the Court can reject the obnoxious condition and uphold the gift of the annuity.

In support of the second contention, counsel for the residuary legatees rely upon the decision of Kay J., and the Court of

(1) 3 D. M. & G. 982. (2) [1916] 2 Ch. 304.

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Appeal in *In re Moore* (1) and upon the earlier authorities referred to in the judgments in that case. In my opinion the essential distinction between *In re Moore* (1) and the present case is that the provision in the former was a provision made in contemplation of a future separation between a husband and a wife who were then living together, whereas the provision in the present case is for a wife who at the date when it was made and took effect was living apart from her husband by whom she had been deserted. It is well settled that the law of England does not allow provisions made in contemplation of a future separation between husband and wife (see per Cotton L.J. in *In re Moore* (2)), but I have not been referred to a single case in which it has been held that this doctrine applies to a provision for the maintenance of a wife whilst living apart from her husband where the husband and wife have already separated at the time when the provision is made. On the contrary the only case cited to me in which the validity of such a provision was challenged is *In re Charleton* (3), and in that case Joyce J. apparently without hesitation held that there was nothing contrary to the policy of the law in such a provision. I postponed giving judgment at the conclusion of the arguments in this case in order to ascertain whether a shorthand note had been taken of the judgment of Joyce J. in *In re Charleton.* (3). I have been informed that no such shorthand note was taken ; the learned reporter who made the note for the Weekly Notes has however informed me that the report contains substantially the whole of the judgment which was delivered. Mr. Owen Thompson has further argued that, assuming the report of that case to be accurate, the decision is in conflict with the principles laid down in *In re Moore* (1) and in the earlier cases upon which that case was founded. In my judgment that argument is based on a mistaken view of the principle involved. Even in the case of *Cartwright* v. *Cartwright* (4) (which was the case mostly relied on by Mr. Owen Thompson) Turner L.J. clearly points out the distinction between such a case as

(1) 39 Ch. D. 116.
(2) 39 Ch. D. 128.
(3) [1911] W. N. 54.
(4) 3 D. M. & G. 982, 991.

Bateman v. *Countess of Ross* (1), in which there had been a separation between the parties at the time when the arrangement was made, and such cases as *Brown* v. *Peck* (2) and *Earl of Westmeath* v. *Countess of Westmeath* (3) in which provisions were made in the event of a future separation of the husband and wife who were then living together. I have found nothing in any of the cases to which my attention has been called which affords any support to the argument that it is contrary to the policy of the law to make a provision for the maintenance of a wife who has been deserted by her husband during such period as she shall live apart from him, but on the contrary there is much to be found in the various authorities which shows that such a provision is wholly unobjectionable.

It has long been settled that in the case of separation deeds provisions made for maintenance during the separation are valid and will be enforced by the Courts, the reason being that in such cases the separation has already taken place or at all events is in immediate contemplation. So far as the policy of the law is concerned there is in my opinion no distinction in principle between provisions made in separation deeds and provisions made in any other instruments nor (as has been suggested) between provisions made for a wife by a husband and provisions made for a wife by any other person. In the case of a provision made by a stranger the Court would no doubt more readily come to the conclusion that the object and purpose of the provision was not to afford maintenance for the wife during the period of separation but to induce the wife not to return to her husband. In the absence however of any evidence showing that the provision was made for an illegal purpose the Court would in my opinion uphold a provision for the maintenance of a married woman whilst living apart from her husband where the separation had already taken place at the date when the provision was made, and that whether the provision was made by the husband himself or by any other person. If indeed the Court

(1) (1813) 1 Dow, 235. (2) 1 Eden, 140.
(3) (1821) Jac. 126.

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were to arrive at the conclusion from the evidence in any particular case that the real purpose of making the provision was to induce the wife contrary to her duty to continue in a state of separation and not to provide maintenance for her whilst in that state, it may well be that it would be held that such a provision was contra bonos mores and void, but I think that the statement of the theory of the law in the judgment of Knight Bruce L.J. in *Cartwright* v. *Cartwright* (1) was not (as has been urged) intended by that learned judge to involve the proposition that every provision for a wife whilst living in a state of separation is void as being against the policy of the law.

Mr. Henry Johnston has strenuously argued that the insertion in the will of the proviso that Mabel Southall should be living with the testator at the time of his death as a condition precedent to her taking the annuity shows that the bequest was intended merely as an inducement to her to continue to live apart from her husband and therefore renders the bequest void. I confess I have great difficulty in following this argument. The will only takes effect at the death of the testator, the proviso could not therefore have been intended as an inducement to Mabel Southall thereafter to continue to live with the testator, nor could the proviso by any possibility influence Mabel Southall's future conduct one way or the other. The event on which she was or was not to take the annuity was determined once for all at the moment when the will became operative. She either took or did not take the annuity according to whether the condition precedent laid down by the testator was or was not fulfilled. I could understand an argument in favour of the invalidity of the bequest founded upon a bargain made by the testator in his lifetime that if Mabel Southall would continue to live with him until his death he would leave her an annuity. I express no opinion whether such an argument would succeed, but content myself by saying that in this case no such bargain has been attempted to be proved or even suggested, nor has it been suggested that the testator in his lifetime informed Mabel Southall

(1) 3 D. M. & G. 982, 988–9.

of the terms of his will or of his intention to leave her an annuity if she continued to live with him. I think that it would be altogether unreasonable to hold that because of this proviso the Court ought to impute to the testator an intention that the gift should operate so as to prevent her returning to her husband or remarrying rather than an intention to provide her with maintenance until she should again live under the protection of a husband who would undertake the duty of maintaining her. Further, the condition that she should live a clean, moral and respectable life in my opinion tends to negative the contention that the real object was to prevent her from returning to her husband. Some point has been made of the fact that Mabel Southall was living in adultery at the time when the will was made and up to the time when it took effect, but this fact cannot in my opinion affect adversely to her the question I have to decide in this case. On the contrary the fact that she had been living with the testator for some time and had had a child by him furnishes to my mind a strong reason why he should desire to make a provision for her maintenance. Moreover, I have been furnished with the affidavits in the case of *In re Charleton* (1), from which it appears that the wife in that case was also living in adultery at the time when the will was made and when it took effect, and the learned judge does not seem to have considered that fact relevant to the point he had to decide. In the present case everything in my judgment tends to the conclusion that the testator in making the bequest was actuated solely by the desire to make an adequate provision for Mabel Southall until she should return to live with her husband or remarry, and even in that event he makes a provision for her although of a smaller amount. Regard being had to the fact that the testator was a married man with a family, I do not think that it can be said to be contrary to the policy of the law that he should desire to increase the benefits given to his legitimate children by reducing the annuity given to Mabel Southall if and when she should return to her husband or marry somebody whose first duty it would be to

(1) [1911] W. N. 54.

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adequately maintain her. In the result I have come to the conclusion that there is not the slightest reason for suggesting that the reduction in the annuity in the event of Mabel Southall returning to live with her husband or remarrying was designed or intended as an inducement to her not to return to her husband or not to remarry. I therefore hold that the bequest to her of the annuity of 750*l.* is not contrary to the policy of the law but is valid, and I will make a declaration accordingly.

Solicitors: *Sparks, Whitehouse & Co.; Lovell, Son & Pitfield; S. Hughes, Sons & Minton for Thomas, Guest & Co., Birmingham.*

H. L. F.

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[1918. W. 1743.]

Inclosure Act—Reservation of Coal—Full Powers of Working—Subsidence under any System inevitable—Knowledge of Legislature at Date of Act—Relevance.

An Inclosure Act of 1791 reserved the rights of the owners of the coal under the commons and gave them full powers of getting and carrying it away without making satisfaction "in as full large ample and beneficial a manner to all intents and purposes whatsoever, as if this Act had not been passed." There was no compensation clause.

In 1791 and long previously, the coal was worked by the long wall system, which inevitably caused subsidence of the commons, but did not interfere with the commoners' grazing rights. These facts were notorious at the date of the Act.

In 1918 the defendants, who were coalowners, proposed to work a shallow seam under the plaintiff's allotment by the long wall system with the inevitable result of letting down her allotment and buildings.

In addition to proving that the long wall system with its inevitable subsidence was to the knowledge of all parties in common practice at the date of the Act, and submitting that it was thereby authorized, they also proved the recently ascertained fact that the working of any seam, deep or shallow, by any system whatever necessarily caused subsidence, and that the long wall system did the least damage:—

Held, having regard to the common practice known to all parties at the date of the Act, the long wall system with its necessary results was thereby authorized.

Held, also, apart from these special circumstances that as the Legis-

lature had in any case given the coalowners a clear and unambiguous right to get the coal in some way or another they were entitled to get it; and as it was now proved that all systems caused subsidence, they were entitled to cause subsidence; the question whether the Legislature knew the inevitable effect of exercising the right so clearly given being irrelevant.

Butterley Co. v. *New Hucknall Colliery Co.* [1909] 1 Ch. 37; [1910] A. C. 381; *Duke of Buccleuch* v. *Wakefield* (1870) L. R. 4 H. L. 377; and *Bell* v. *Earl of Dudley* [1895] 1 Ch. 182 followed.

Bell v. *Love* (1884) 10 Q. B. D. 547; 9 App. Cas. 286; *New Sharlston Collieries Co.* v. *Earl of Westmorland* (1900) [1904] 2 Ch. 443 n.; and *Bishop Auckland Industrial Co-operative Society* v. *Butterknowle Colliery Co.* [1904] 2 Ch. 419; [1906] A. C. 305 (based on the now obsolete view that an alternative method of working without subsidence was possible) distinguished.

Thomson v. *St. Catharine's College, Cambridge* [1919] A. C. 468 distinguished.

WITNESS ACTION.

By the Heanor and Codnor Inclosure Act, 1791 (31 Geo. 3, c. 48), after reciting that Heanor Common and Codnor Common, waste grounds in the lordships of Heanor and Codnor, Derbyshire, contained 600 acres, and that Legh Master as lord of the manors or lordships was entitled to the cottages situate on the said commons or waste grounds, and that the owners of messuages and hereditaments situate within the lordships were entitled to right of common upon the said commons or waste grounds, and that the said commons or waste grounds were in their present situation incapable of improvement, and it would be very advantageous to the several persons interested therein to have the same divided and enclosed and specific shares thereof allotted to them according to their several rights and interests, the usual provisions for enclosure and allotment were made. The lord was to receive allotments in compensation for his title to the cottages and to the soil of the said commons or waste grounds, and the residue was to be allotted to the commoners in compensation for their rights of common thereby extinguished.

It was then provided and enacted that "nothing in this Act contained shall give any right or title whatsoever to any of the said proprietors to whom any allotments shall or may be made by virtue of this Act to any coal mines veins delphs or lymphs

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of coal lying and being within or under the said commons or waste grounds but that all and every such coals mines veins delphs and lymphs of coal shall after the passing of this Act belong to and be and remain the sole and absolute freehold and property of the person or persons entitled thereto for such estate and estates and in such manner and form as he or they held and enjoyed the same before the passing of this Act and that such several and respective persons so entitled to such coals as aforesaid their heirs and assigns shall have use possess and enjoy all and every the liberties and privileges of making coal pits sinking for and getting coals and stacking the same after got and of setting down engines driving and making soughs and trenches and conveying water either above or under ground for the getting such coals and also all ways roads and passages for leading and carrying away the same coals after got and all other liberties and privileges whatsoever needful and necessary for the getting stacking coaking conveying and taking away the said coals upon within under through or over the said commons or waste grounds without making any satisfaction for the same in as full large ample and beneficial a manner to all intents and purposes whatsoever as if this Act had not been made."

It was further provided and enacted that " nothing in this Act shall prejudice the right of the said Legh Master as lord of the said manors of Heanor and Codnor in or to any seigniories royalties fisheries rights customs and services incident or belonging to the said manors (except such for which compensation is hereinbefore directed to be made) but that such lord for the time being and all and every person and persons claiming or to claim under or in trust for him as lord of the said manors shall and may at all times hereafter hold and enjoy all rents services courts fines chief rents or quit rents perquisites and profits of courts and all other royalties and privileges to the said manors incident belonging or appertaining (except as aforesaid) in as full ample and beneficial a manner to all intents and purposes as he or they might have held and enjoyed the same in case this Act had not been made."

This was followed by a saving clause :—

" Saving always . . . . to all . . . . persons . . . . (other than and except the respective persons to whom any allotment or compensation shall be made by virtue of this Act in respect of the interest or property for which such allotment or compensation shall be made) all such estate right interest claim and demand as they . . . . ought to have had or enjoyed of in to or out of the said commons or waste grounds so directed to be divided and enclosed as aforesaid in case this Act had not been made."

The plaintiff was the life tenant in possession of 17 acres of Codnor Common allotted as freehold under the Act.

The defendants, a colliery company, were owners of the manor of Codnor which was conveyed by the lords to their predecessors in 1863 together with all mines minerals and other manorial rights. In virtue of this conveyance and the reservations of the Inclosure Act they claimed the ownership and right of working the coal under the plaintiff's land and were about to work a shallow seam entirely out by the long wall system, which would necessarily cause subsidence.

On December 7, 1918, the plaintiff, who did not admit the defendants' title to the coal, commenced this action for an injunction to restrain the defendants from working the coal so as to cause subsidence or injury to the plaintiffs' land or any buildings or erections thereon.

The defendants alleged and proved that the particular parcels of coal belonged to the lord in 1791 and 1863 and therefore passed to them by the conveyance of the manor, and they relied on the reservation of coal and coal mining rights in the Inclosure Act.

They also alleged and proved that long before the passing of that Act and at its date coal under parts of Heanor and Codnor Commons and other large areas in the neighbourhood was worked by a system under which all the coal was removed with the inevitable result of causing subsidence, but in no way interfering with the rights of common which were confined to grazing rights.

They also alleged and proved that these facts were notorious in the district when the Act was passed, and submitted that

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at that date all parties contemplated that the reserved coal should be worked as before with the same result of causing subsidence.

They also proved the recently ascertained scientific fact that the working of any seam deep or shallow by any system whatever necessarily caused a corresponding subsidence, the long wall system doing the least damage, and that the supposed exception of shallow seams was erroneous.

The plaintiff relied on the Inclosure Act and gave no evidence to rebut the defendants' evidence as to working or its effect.

Maugham K.C. and *Ashworth James* for the plaintiff. A right to let down the surface can only be given by clear words or necessary implication in the instrument of severance. A right to work the minerals is not enough : *Harris* v. *Ryding* (1); *Hext* v. *Gill* (2) ; *Bell* v. *Love* (3) ; *New Sharlston Collieries Co.* v. *Earl of Westmorland* (4); *Bishop Auckland Industrial Co-operative Society* v. *Butterknowle Colliery Co.* (5); *Thomson* v. *St. Catharine's College, Cambridge* (6), affirmed in the House of Lords. (7)

The question therefore is whether the Legislature in 1791 intended to enlarge the rights of the coalowners by giving them power to let down the new allotments, or merely to reserve their old mining rights which enabled them to let down the surface of the commons so long as they did not injure the existing surface rights, then mere rights of pasture.

As the paramount object of the Act was to improve the surface by the new allotments, the Legislature clearly did not intend to give any one a right to destroy them without compensation. In such a case the right to mine is purely subsidiary. In the case of a mining lease, on the other hand, the paramount intention of lessor and lessee is to have the mine worked, and if both parties know that subsidence is necessarily involved,

(1) (1839) 5 M. & W. 60.
(2) (1872) L. R. 7 Ch. 699.
(3) 10 Q. B. D. 547 ; 9 App. Cas. 286.
(4) [1904] 2 Ch. 443 n.
(5) [1904] 2 Ch. 419 ; [1906] A. C. 305.
(6) [1918] W. N. 104 ; 118 L. T. 758, 763, 767.
(7) [1919] A. C. 468.

it is necessarily authorized by the lease: *Butterley Co.* v. *New Hucknall Colliery Co.* (1)

Talbot K.C. and *MacSwinney* for the defendants. Whatever may have been the intention of the Legislature in 1791 the Act in fact gave a clear right to work the coal, and we have now proved that any system of working causes subsidence. Even at that date it was well known that the long wall system universally used in the district caused subsidence.

In the *St. Catharine's College Case* (2) working was not contemplated and no right to work was given. In the present case there is a full right to work. The reservation is equivalent to a grant, and all future improved methods are authorized: *Dand* v. *Kingscote* (3); *Newcomen* v. *Coulson.* (4) The present case is therefore covered by *Duke of Buccleuch* v. *Wakefield* (5); *Bell* v. *Earl of Dudley* (6); and the *Butterley Case.* (1) See also *Jones* v. *Consolidated Anthracite Collieries* (7). *Hayles* v. *Pease and Partners, Ld.* (8); and *Rowbotham* v. *Wilson.* (9)

In *Hext* v. *Gill* (10) no right to work the china clay was reserved. The plaintiff's other cases were based on the now exploded fallacy that there was an alternative method of working without subsidence.

Maugham K.C. in reply. The actual old working, whatever it was, no doubt caused subsidence without injury to the commoners. But in 1791 it was not known that all systems caused subsidence. This is not even true in the case of shallow seams worked under the pillar and stall system.

[ASTBURY J. The defendants have proved that all methods cause subsidence, and you have given no evidence to the contrary.]

In construing an ancient document the Court must put itself in the position of the parties and adopt the

(1) [1909] 1 Ch. 37; [1910] A. C. 381.
(2) [1919] A. C. 468.
(3) (1840) 6 M. & W. 174, 198.
(4) (1877) 5 Ch. D. 133, 138.
(5) L. R. 4 H. L. 377.
(6) [1895] 1 Ch. 182.
(7) [1916] 1 K. B. 123, 133.
(8) [1899] 1 Ch. 567.
(9) (1860) 8 H. L. C. 348, 363.
(10) L. R. 7 Ch. 699.

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contemporanea expositio: Norton on Deeds, pp. 64, 140; *Hart* v. *Hart*. (1) Recent scientific knowledge, even if admissible, is surely immaterial.

In *Dand* v. *Kingscote* (2) the grant of wayleaves was construed to include wayleaves from time to time necessary in the future. But the present reservation only reserves existing rights. It does not enlarge them.

In the *Butterley Case* (3) both parties knew at the date of the 1887 lease that all working must cause subsidence. That case is inapplicable here unless knowledge of this fact in 1791 is proved: MacSwinney on Mines, 4th ed., p. 345. Such knowledge was proved in *Bell* v. *Earl of Dudley*. (4) Apart from that knowledge, there can be no necessary implication that the Legislature by reserving the existing rights of the coalowners intended to enlarge them by authorizing subsidence and destruction of the new allotments without compensation. See the judgments of the Court of Appeal in the *St. Catharine's College Case*. (5)

Duke of Buccleuch v. *Wakefield* (6) and *Bell* v. *Earl of Dudley* (4) really turned on the compensation clauses. The latter case was doubted by Farwell J. in the *Butterknowle Case* (7), but it was explained by Lord Atkinson as depending on the 200 years' practice and the known impracticability of working that coal without subsidence.

ASTBURY J., after stating the facts and holding that on the issues raised by the pleadings the defendants had made out their title to the coal, continued: The second and substantial question is whether the defendants are entitled to work their coal so as to cause subsidence or injury to the plaintiff's land, or whether I ought to grant an injunction.

The plaintiff relies on a number of well-known authorities, of which *Hext* v. *Gill* (8), *Bell* v. *Love* (9), the *New Sharlston*

(1) (1881) 18 Ch. D. 670, 692.
(2) 6 M. & W. 174, 198.
(3) [1909] 1 Ch. 37; [1910] A. C. 381.
(4) [1895] 1 Ch. 182, 188.
(5) 118 L. T. 758, 763, 767.
(6) L. R. 4 H. L. 377.
(7) [1904] 2 Ch. 429; [1906] A. C. 322.
(8) L. R. 7 Ch. 699.
(9) 10 Q. B. D. 547; 9 App. Cas. 286.

Case (1), and the *Butterknowle Case* (2) are typical. The recent *St. Catharine's College Case* (3) is also said to be decisive. The defendants in their turn rely on the principles laid down in the same authorities when applied to the facts of this case and in the manner pointed out by the Court of Appeal and House of Lords in the *Butterley Case*. (4) Both sides have argued this issue with such clearness and ability that I need not reserve my judgment.

The plaintiff contends that, on the authorities generally, including many House of Lords decisions, no Court could possibly decide for the defendants. I am not so sanguine, nor do I agree with the suggestion that the defendants' careful and exhaustive argument throws those decisions to the winds.

Scientific fallacies die hard in this country, especially when wrongly assumed to have been confirmed by judicial decision. In this case fortunately no difficulty arises on the relevant scientific facts. The defendants have proved them, and the plaintiff has given no evidence to the contrary. I have merely to apply legal principles long settled, and really indisputable, except, perhaps, in their application. I will first summarise the respective contentions, and then deal with the facts as proved, including certain documents put in, and the defendants' oral evidence and the bearing and effect of the principal authorities.

It is not in dispute that the plaintiff is entitled to have her land supported, unless this right has been taken from her by express words, or by necessary implication in the Inclosure Act of 1791. If the Legislature has given the owners of the coal under the allotment an unequivocal and unconditional right to work and carry it away, neither this nor any other Court can deprive them of that right, and no authority has even suggested, or still less held the contrary. If, however, on the true construction of the document of severance there is any doubt or ambiguity whether that right has been so given in any particular case, then the right of the allotment holder under an Inclosure Act,

(1) [1904] 2 Ch. 443 n.
(2) [1904] 2 Ch. 419; [1906] A. C. 305.
(3) [1919] A. C. 468.
(4) [1909] 1 Ch. 37; [1910] A. C. 331.

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or of the grantee or lessee of the surface in other cases, to full support and non-interference with the surface will prevail.

It used to be thought in some quarters, and the evidence or admissions called or made in many cases have induced or obliged the Courts to hold, that coal can be worked commercially in two ways, one by pillar and stall working, which was believed or admitted not to cause subsidence of the upper strata, and the other by long wall working, which necessarily does so. In these circumstances when the surface and the mines were severed, and a right to work and carry away the coal given or reserved without more, the Courts have frequently held that in order to give effect to the respective and concurrent rights of the surface owner and the mining owner or lessee, under the document of severance, the latter must only work in the manner which would not cause subsidence, because there being at least a doubt or ambiguity as to whether any other method of working was given or reserved, no right to cause subsidence was by necessary implication conferred.

This is the class of authority appealed to by the plaintiff in this case. She points out that the 1791 Act reserves not to the lord per se, but to the owners of the coal in the manor their old rights only, to be exercised in as full and beneficial a manner as if the Act had not been passed, without making any satisfaction for the same. She contends that the question is, " What, with the knowledge of that time, does the language of the Act really mean ? " She also contends that subsequent knowledge cannot enlarge or alter the rights given in 1791 and that no necessary implication can be made that the Legislature gave power to let down the surface unless it then knew that working and carrying away the coal had this effect.

With the exception of the last sentence, I doubt whether the defendants are concerned to deny these propositions. As to the last, unless there is some doubt or ambiguity as to the meaning of the reserved right to work and carry away, and unless working and carrying away coal can in some way be exercised without causing subsidence, I do not understand how the Legislature's knowledge, or ignorance, as to the effect or result of a right expressly given affects the matter, or how

it can be ascertained. The real question is what, on the true construction of the Act, is the right expressly reserved. If its exercise in any and every way must cause subsidence, there is no room to contend that some non-existing qualified right of working, not leading to this result, was all that was intended; or that the reservation of an express right to work and carry away, given by the Legislature in clear and unambiguous terms, as far, at least, as some form of working and carrying away is concerned, is to be set at nought and treated, as described in the *Butterley Case* (1), as an idle form or dead letter because it cannot be exercised in some way that the laws of nature render impossible.

The plaintiff further contends that the *Butterley Case* (1), on which the defendants rely, was confined to cases of grants inter partes in mining leases, and has no application to an Inclosure Act, the object of which is to improve agriculture by the allotments. The defendants correctly say that no such general proposition is sound, but that each case must depend on its own facts, subject to certain general propositions definitely approved by the Court of Appeal and House of Lords in the *Butterley Case.* (2) They point out, as emphasising this, that the Norton Inclosure Act, 1814, in the *St. Catharine's College Case* (3) had as its paramount and only object the improvement of agriculture, as it was not then believed that the coal could be worked, and no powers to do so were given. Per contra they say that an important object of the present Act was to sanction the continuance of coal mining in a district where it had long been actively carried on, and the doing of infinitely greater damage to the surface without compensation, than by merely causing such subsidence as had long been in operation.

The evidence in the present case, and the true inferences to be drawn from it, establish the following facts :—

(1.) Coal mining has been carried on in an increasing scale in this district since the sixteenth century.

(1) [1909] 1 Ch. 37, 47; [1910] A. C. 381, 383.

(2) [1909] 1 Ch. 37; [1910] A. C. 381.

(3) [1919] A. C. 468.

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(2.) The method adopted has from very early times, and before 1791, been one by which all, or substantially all, the coal has been removed, except occasional pillars left for the support of roads, and, in some cases, of buildings ; and there is no present trace in the district of any other method of working having taken place. If pillar and stall working had been common for the attempted support of the surface generally, as late as 1791, traces of this would be apparent on the surface, which is still arable and old pasture, and this is not the case.

(3.) Before 1791 and onwards the result of that working has always been known to cause subsidence.

(4.) There is no method by which coal can be so worked as not to cause subsidence in this or any other part of the country.

(5.) Pillar and stall working causes a form of subsidence much more dangerous to, and destructive of, the surface and buildings thereon than long wall working as practised by the defendants. The latter lets down the surface evenly, and does not otherwise injure it, at all events, to anything like the same extent. It is an exception for long wall working to injure buildings on the surface if properly carried out, whereas in pillar and stall working, apart from leaving large unworked areas of coal under buildings, the exception, if there be one, is the other way. [His Lordship reviewed the evidence.]

I will now refer to the more important cases. Those relied upon by the plaintiff, with the exception of the recent *St. Catharine's College Case* (1), were all decided before the *Butterley Case* (2) came before the Court of Appeal and the House of Lords.

The *Butterley Case* (2) was a case of seam and seam, but the principles on which it was decided are, subject to certain qualifications, equally applicable as between surface and seam. In that case Fletcher Moulton L.J. stated that it differed from most of those which had been before the Court in the past in that for the first time the Court, by proper evidence, had been made cognisant of the fact, which had long

(1) [1919] A. C. 468. (2) [1909] 1 Ch. 37, 49; [1910] A. C. 381.

been known to those acquainted with coal mining, that except in the case of shallow seams the working of coal in a seam was inevitably followed by a corresponding sinking of the whole of the upper strata, and consequently of the surface. Since those words were uttered the question of shallow seams has been further discussed, and the evidence in the present case shows that no exception of shallow seams can be made in this respect. The real fact is that there is no practical method known to science by which coal can be extracted without a corresponding subsidence of the strata above. In that case very similar arguments to those of the present plaintiff were used, but, on the fresh evidence supplied, the Court of Appeal and the House of Lords came to the conclusion that the result of previous cases could not be followed as to the implication to be drawn from the gift of a right to work and carry away coal. Cozens-Hardy M.R. said (1): "It has been laid down again and again in the House of Lords, and nowhere more clearly than in [the *Butterknowle Case*] (2), that there is a presumption, in construing a document by which mines are severed from the surface, that a right to let down the surface by mining operations must be presumed not to exist unless there are clauses in the instrument which expressly, or by necessary implication or intendment, are inconsistent with the presumption of support." Then he refers to the maxim "Quando aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit," and uses these words: "In every case which has been brought to our notice by counsel it was either (1.) proved, or (2.) admitted, or (3.) assumed that the subjacent mines could be worked in such a way as not to produce subsidence of the surface, and in that state of facts it was held that the first presumption to which I have referred must prevail, and that provisions framed in very wide language ought to be so construed as to apply only to such mining operations as would not cause subsidence. In no case has the presumption been so applied as to render the lease or grant or reservation of the subjacent mines an idle form. The injunction granted has been to restrain the defendants from working the mines

(1) [1909] 1 Ch. 46. (2) [1906] A. C. 305.

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so as to let down the surface—a form which presupposes the possibility of working the mines without letting down the surface." That sentence really sums up the differences between the *Butterley Case* (1) and the present case on the one hand and the plaintiff's authorities on the other. Fletcher Moulton L.J. said (2): "If the instruments [of severance] make it clear that it was the intention of the parties that subjacent seams should be worked, it is a necessary implication that they intended that there should be subsidence of the superjacent strata." In other words, if the instrument of severance gives a clear and definite right to work and carry away coal, then as soon as it is ascertained that there is no possible way of doing so without causing subsidence, there is no room to discuss what implication the Legislature may have intended. All that is then necessary is to see whether the right is given. If so, and there is no possible way of exercising it without producing the result that nature provides, it is impossible to contend, nor is there any authority, that, in those circumstances, the clause giving the right is to be regarded as idle and meaningless.

There are a number of expressions of many judges both in the *Butterley Case* (1) and in earlier cases, as to the knowledge, or the presumed knowledge, of the parties at the date of the instrument of severance. This was no doubt very relevant at a time when it was supposed that there were different methods of working coal, with different results as to subsidence. But once the scientific fact that every method of working must cause subsidence is proved, it is irrelevant to discuss what the parties knew, or did not know, at the date of the instrument as to the effect of exercising the right, provided it is clearly given. If the right is given, and there is only one possible result of exercising it, then the right to cause that result must necessarily follow.

The judgments of the Lords Justices in the *Butterley Case* (1) are in terms confirmed in the House of Lords. Lord Macnaghten, who took a leading part in one at least of the earlier cases, says (3): "It is plain that the parties contem-

(1) [1909] 1 Ch. 37; [1910] A. C. 381. (2) [1909] 1 Ch. 49.
(3) [1910] A. C. 385.

plated that the underlying seam would be worked concurrently with the Top Hard seam. It was proved, or admitted, that the proper mode of working both seams is by the long wall system. It was also proved, or admitted, that working by the long wall system must of necessity produce subsidence in the upper strata." In those circumstances, he held that the right to cause subsidence was given by necessary and obvious implication. In Lord Atkinson's judgment this important passage occurs (1): " The instrument of severance in this case (the first lease) has . . . . authorized by necessary implication the interference and disturbance . . . . complained of, in that it has authorized the system of mining of which that disturbance is the inevitable consequence, and thus comes within the exception mentioned by Lord Macnaghten. There is, therefore, no room for a presumption . . . . that the parties to the document of severance could not have intended that the surface should be destroyed, when effect can be given to the rights of both parties by restricting the mine owner to working his mine 'so far as is possible without letting down the surface.'" These passages explain practically all that I need say upon the point of necessary implication.

Before I pass on, I desire to say a word with regard to the plaintiff's argument that in these Inclosure Acts no right to let down can be presumed unless it was known at the date of the Act that this result would be caused by exercising the powers given by the statute, in support of which a passage was cited from MacSwinney on Mines, 4th ed., p. 345, which, referring to the *Butterley Case* (2), says: " In order that the decision may apply it is essential to show, not merely impossibility of working without letting down, but knowledge of the fact at the crucial date." I doubt very much whether a statement in that unqualified form is accurate. If it be so, it does not affect the defendants, because upon the evidence I am satisfied first that long wall working was in operation in this neighbourhood before the 1791 Act; and, secondly, that it was equally known that that working would and must necessarily cause subsidence. [His Lordship referred to some further evidence.]

(1) [1910] A. C. 392. (2) [1909] 1 Ch. 37; [1910] A. C. 381.

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But I am not satisfied that even if these facts had not been known to the Legislature at the date of the Act, the result contended for by the plaintiff would follow. If there is any ambiguity in the right given to work the coal, I can understand judges discussing the parties' knowledge or ignorance at the time as to the effect of working in one way or another. Where an implication has to be drawn from the grant of an ambiguous right, that is a very relevant inquiry. If, on the other hand, there is no ambiguity, and there is only one right and only one result, the only question is: "Does the Act give the right, or does it not?" If it does give it, it is not for the Court to discuss whether the result of its exercise was known at the date of the Act.

Further, in the case of many of these old statutes, I do not see how it is possible at this time to ascertain with any certainty what the Legislature or the parties to the Act knew or did not know as to the effect of working and carrying away coal with all the improved methods of doing so which the future might have in store. As said in so many of these cases (1) the only true criterion is to construe the statute or the contract in question, and abide by that construction.

The Butterley Case (2) has been followed in a case of surface and seam by Scrutton J. in *Jones* v. *Consolidated Anthracite Collieries.* (3)

Before dealing with the plaintiff's cases I will refer to *Duke of Buccleuch* v. *Wakefield* (4), where under a special Inclosure Act of 1821 the right to let down was held to have been included. Lord Hatherley said (5): "We find . . . . workings going on of these valuable minerals, . . . and that the parties were brought together in the relative positions of commoners and the lady of the manor. We find that the matter was, to say the least of it, so existing de facto, namely, that the mines were worked, and that compensation was made. . . . . Whether that was done as of right, or whether it was by special agreement in each case, is a matter which is in dispute upon the

(1) *e.g. Buchanan* v. *Andrew* (1873) L. R. 2 H. L. Sc. 286, 288, 298.
(2) [1909] 1 Ch. 37; [1910] A. C. 381.
(3) [1916] 1 K. B. 123.
(4) L. R. 4 H. L. 377.
(5) L. R. 4 H. L. 396.

evidence. And the parties might well, when coming together before Parliament, ask the Legislature to make such a bargain between them as should for the future determine clearly and distinctly the several rights to which they should be entitled, and I think that that bargain is distinctly carried into effect in the 43rd clause." With the exception of the passage relating to compensation, that applies equally to the present case. Lord Chelmsford said (1): "Upon this appeal two questions have to be decided: first, whether the mines can be properly and effectually worked without causing a subsidence of the soil; if not, secondly, whether the Duke of Buccleuch, or his tenant, is entitled to work the mines, and so injuriously affect the respondent's lands, paying compensation for any damage occasioned by such working. The first question is one entirely of fact. . . . . The result of the evidence appears to be that the mines are of hematite iron ore of an extremely friable nature. . . . . Great numbers of scientific witnesses describe . . . . the character of the ore, and the ordinary mode of working the mines, and state that no method of working them without causing a subsidence of the surface could be devised. . . . . Upon a consideration of the evidence, I agree in the conclusion at which the Vice-Chancellor arrived: 'That the mines cannot be effectually worked without causing a subsidence of the surface, and that the effect of allowing the injunction to stand will be to stop the working of the iron ore in the district without the consent of the owners of the surface.'"

That is exactly the case here. In that case the House of Lords was satisfied that the right was given and that it could not be practically exercised without the necessary result of subsidence, and they held that that was sufficient to justify that result being caused.

Again, before dealing with the plaintiff's cases, I must refer to *Bell* v. *Earl of Dudley*. (2) This was the case of an Inclosure Act of 1784. The minerals were reserved with a right to work and carry them away as fully and effectively as if the Act had not been passed, and a further clause of the statute gave a

(1) L. R. 4 H. L. 404. (2) [1895] 1 Ch. 182.

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very wide and full power of working, the owners to do as little damage as may be in exercising the right. Special provisions were made as to compensation. Chitty J. held that the common law right to support of the surface could not prevail. He says (1): "Where, as here, the ownership of the minerals and of the surface is severed, the prima facie inference is that the owner of the surface shall enjoy the surface allotted, and shall have the common right of support for his tenement. This inference is strong; in order to rebut it the burden lies on the owner of the minerals to show affirmatively and by clear words that he has the right of letting down the surface. When clear words are spoken of, it is not meant that the Act must say in express terms that the mineral owner may let down the surface. That such express words are not required is shewn by *Duke of Buccleuch* v. *Wakefield* (2), and by the decision of the House of Lords on a Scotch instrument in *Buchanan* v. *Andrew*." (3) Then again, he says (4): "The coal has been worked for upwards of 200 years, and the surface has necessarily been let down. The preamble of the statute recites the title of the defendant's predecessor as lord of the manor; that the waste lands afforded very little profit, but were capable of great improvement, and would, if divided and inclosed so as to be converted into tillage, be of great advantage to the persons interested therein." Again, he says (5): "Although it was known at the time that the Act was passed that the working of the coal had caused subsidence in the surface, and, indeed, that it was impracticable to work the thick seam of coal without such subsidence, the words import that the lord may work the mines without making any satisfaction to any person or persons whomsoever, the latter words of course including the allottees."

In the *Butterknowle Case* (6) Farwell J. expressed great doubt whether *Bell* v. *Earl of Dudley* (7) could stand with the subsequent decision in 1900 of the House of Lords in the *New*

(1) [1895] 1 Ch. 186.
(2) L. R. 4 H. L. 377.
(3) L. R. 2 H. L. Sc. 286.
(4) [1895] 1 Ch. 187.
(5) [1895] 1 Ch. 188.
(6) [1904] 2 Ch. 429; [1906] A. C. 322.
(7) [1895] 1 Ch. 182.

Sharlston Case. (1) But *Bell* v. *Earl of Dudley* (2) was accepted in the House of Lords by Lord Atkinson in the *Butterknowle Case* (3), and for the reasons which he there gives.

I will now say a word about the plaintiff's cases.

In *Bell* v. *Love* (4), an Inclosure Act case, it was virtually admitted that there were two methods of working coal, one by carrying away all the coal without leaving any pillars or other support for the roof of the mine or of the surface, and one by leaving support. In other words, it was assumed by both parties that there was a method of working by leaving pillars for the support of the surface, by which subsidence would be avoided, and it is upon those facts that the judgment of the Court was based. In Baggallay L.J.'s judgment (5) it is plain that he thought that a sufficient support could be left and a right to work exercised so as to avoid subsidence. He pointed out (6) that there was no indication or suggestion as to the portions of the manor under which working had been carried on, or whether any portion of the surface had by reason of such working been disturbed or let down. The facts are found by Lindley L.J. in a striking way. (7) They were first, that the lords had not worked under the common in question before the Act; secondly, that although the lords had worked mines in the manor without leaving support, there was no statement that the surface was in fact let down by such working, and, fifthly, that the wording of the compensation clause in the statute led to the conclusion that it was limited to temporary damage, and did not deal with such permanent injury as subsidence. He says (8) that no right to work the mines was reserved otherwise than as "ordinary" owners, and it is plain from his judgment as a whole that he was of opinion that an ordinary method of working would be to work so as not to cause subsidence, whereas a working which would cause subsidence would be extraordinary. The House of Lords (9) took exactly the same view. Lord Selborne speaks of a proper

(1) [1904] 2 Ch. 443 n.
(2) [1895] 1 Ch. 182.
(3) [1904] 2 Ch. 429; [1906] A. C. 322.
(4) 10 Q. B. D. 547; 9 App. Cas. 286.
(5) 10 Q. B. D. 557.
(6) 10 Q. B. D. 560.
(7) 10 Q. B. D. 569.
(8) 10 Q. B. D. 570.
(9) 9 App. Cas. 286, 289.

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support left to the surface by pillars, being of opinion that the only right of working intended to be given was subject to that proper support of the surface being left. There is a long discussion (1) by the same learned judge as to the meaning of the lord's altered right of working under the allotments. That, if carefully read, is evidently all based upon the notion of there being alternative methods of working, one, which causes subsidence, and the other which does not, and it is summed up in these words (2): "It is contended, however, that the usual powers of working mines do involve some right of interference with the surface; and that is contemplated by this proviso. But why should more be supposed to be contemplated? What word is there which shows more than this, that it is contemplated, that in the working of mines, as well as in the use of way-leaves, there may be some interference with the surface, in respect of which compensation is to be made? That would necessarily follow from the usual powers of working; but this consequence which is now sought to be established would not follow from the usual powers of working." That means that the usual form and the only form of working sanctioned by this statute was a form of working which did not cause subsidence, the House being of opinion that there were two alternatives. Lord Watson is of the same opinion, and points out (3) that the construction of an Inclosure Act is the same as that of any deed, etc. Lord Bramwell (4) apparently thought that the mineral owners might have worked 50 per cent. of the coal without causing subsidence.

The plaintiff's next authority is the *New Sharlston Case*. (5) That was the case of a lease and not of an Inclosure Act. The lease gave the right to work and carry away the coal. Evidence was given that there were two methods of working, and the decision is based on the assumption that there could be commercial working of coal to an extent sufficient to enable the Court to assume that all that was intended was such working as could be carried on without letting down the surface.

(1) 9 App. Cas. 291, 292.
(2) 9 App. Cas. 293.
(3) 9 App. Cas. 297.
(4) 9 App. Cas. 301.
(5) [1904] 2 Ch. 443 n.

The plaintiff's next authority is the *Butterknowle Case.* (1) Exactly the same thing applies here. Farwell J. comes to the conclusion that an ordinary method of working was one which would not cause subsidence. He says (2): "The surface owner has by common law the right to have proper support for his surface so as to prevent its subsidence. If the mineral owner contests this right, the burden is on him to displace it. The right can only be displaced by express words or by necessary implication from the words used in the Act. Words, however large, applicable to the right of working and privileges connected with it and compensation for the exercise of such right and privileges are not enough, at any rate, if the words used are fairly applicable to the ordinary course of working and nothing more." It is now proved that there is no ordinary course of working in the sense in which these words were here used at all. Later on Farwell J. says (3): "All appear to me to be quite consistent with the working of mines and quarries in the ordinary way and subject to the ordinary rights of surface owners." Romer L.J. in the Court of Appeal (4) had great doubt about the case, but on the whole, came to the conclusion that Farwell J.'s judgment was right. He says (5): "General powers of working conferred by the Act on the mine owner, however large, will not be held to take away the right of support if the general powers are not inconsistent with the right." And then he says: "Applying this principle of construction to the case before me, the conclusion I have come to is that the Act in question, construed as a whole, does not clearly take away from the surface owners their right of support, and that, accordingly, the decision of Farwell J. must be affirmed. . . . . I need only consider the provisions of the Act in the present case. . . . . These words, no doubt, mention large reservations and powers. But they are general, and can be given effect to consistently with the allottees having the right of support." Of course if that is so, there is an end of the question. In the House of Lords there are one

(1) [1904] 2 Ch. 419; [1906] A. C. 305.
(2) [1904] 2 Ch. 424.
(3) [1904] 2 Ch. 427.
(4) [1904] 2 Ch. 440.
(5) [1904] 2 Ch. 441.

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or two passages which have been constantly cited since, and which are of great value. Lord Loreburn says (1): "Whenever the minerals belong to one person and the surface to another, the law presumes that the surface owner has a right to support, unless the language of the instrument regulating their rights, or other evidence, clearly shows the contrary. In order to exclude a right of support, the language used must unequivocally convey that intention, either by express words or by necessary implication." Then this is the passage so often referred to: "If the introduction of a clause to the effect that the mines must be worked so as not to let down the surface would not create an inconsistency with the actual clauses of the instrument, then it means that the surface cannot be let down." The plaintiff asks me to put this construction upon the 1791 Act, namely, full right to work and carry away the coal, with a proviso that this right must only be so exercised as not to cause the result which nature insists upon, whatever method of working is adopted. Lord Loreburn assumes (1) that there is a right of working which can be exercised without letting down the surface. He refers (2) to usual powers of working, that is, without letting down the surface, again the same thing. Lord Macnaghten refers (3) to working in the usual and proper manner. Lord Atkinson (4) agrees with the decision in *Bell* v. *Earl of Dudley*. (5) I have not time to read all these passages, but Lord Atkinson (6) assumes that commercial working of coal can be exercised without causing subsidence.

In *Bell* v. *Love* (7), the *New Sharlston Case* (8) and the *Butterknowle Case* (9), it is clear therefore, as stated by Cozens-Hardy M.R. in the *Butterley Case* (10) that it was proved, admitted or assumed, that coal could be worked within the meaning of the document of severance, without causing subsidence, and the decisions are plainly based upon that

(1) [1906] A. C. 309.
(2) [1906] A. C. 310.
(3) [1906] A. C. 314.
(4) [1906] A. C. 322.
(5) [1895] 1 Ch. 182.
(6) [1906] A. C. 324.
(7) 10 Q. B. D. 547; 9 App. Cas. 286.
(8) [1904] 2 Ch. 443 n.
(9) [1906] A. C. 305.
(10) [1909] 1 Ch. 46.

presumption for which the respective litigants were solely to blame. The doctrine of Quando aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit, although applied in those cases was not in consequence held on construction to imply any right to let down.

The plaintiff also relied upon *Hext* v. *Gill* (1), which I do not propose to refer to in any detail. That was the case of a grant. The Court held upon the true construction and upon the facts of the case, that the right claimed to work the china clay was not really given by the document at all. This decision really amounts to this: A vendor is not entitled to sell property, put the purchase money in his pocket, and subsequently proceed to destroy it without a very clear and plain reservation of the right to do so. The same may be said of the earlier case of *Harris* v. *Ryding* (2), where the right claimed was refused on the ground that working so as to cause subsidence would be a derogation from the grant and an unusual and improper method of exercising it if it prejudiced the surface. Of those two cases the former is wholly inapplicable, and the latter is based on the exploded view that there is an effective method of mining without causing subsidence.

Before leaving the authorities, I will say one word about *Dand* v. *Kingscote*. (3) That was a grant of land with a reservation of minerals and the right to work them, and the reservation included the making and using of the necessary way-leaves, etc. It was held that this reservation entitled the owner of the reserved minerals to make and use railway lines and steam engines and other modern appliances unknown at the date of the deed on the principle that where a right is plainly given anything from time to time necessary and usual for its exercise is given also. The plaintiff attempts to distinguish this case by saying that there a future right was expressly given, whereas in the Act of 1791 it was not. Personally I am unable to appreciate this. In *Dand* v. *Kingscote* (3) the mineral owner was given the right to make and use way-leaves, and it was held that he might from time

(1) L. R. 7 Ch. 699. (2) 5 M. & W. 60.
(3) 6 M. & W. 174.

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to time, as and when he exercised his right, make and use such way-leaves as modern science and modern knowledge put in his power. Equally under the Act of 1791 I think these coal owners were given the right to work and carry away the coal, not limited to the slow and primitive method known in those days, but according to the light and knowledge of the world from time to time, provided that they did no more than what is included in the act of working and carrying away.

That concludes all I have to say upon the authorities, with the exception of the *St. Catharine's College Case*. (1) This was the case of an Inclosure Act of 1814. It recited that the lords of the manor were owners of the soil and waste grounds and the mines and minerals therein. The Act was silent as to any dealing with or right to work the mines and minerals, and all that the Court had to deal with was an Act prima facie intended to benefit agriculture, with a recital that the mines and minerals were in the lords, but no power reserved to work or carry them away, and there was no reference as such to coal; and then there was a finding of fact in the Court of first instance that at the date when the Act was passed the mines were at such a depth that there was no expectation that they would ever be worked. The defendants in that case claimed to work so as to let down the allotments, with consequent flooding, which they would not have been entitled to do before the date of the statute. In those circumstances it is not very difficult to realize that the House of Lords held that the authorities, such as *Bell* v. *Love* (2) and the *Butterknowle Case* (3), more than applied, and that there was no right under a non-existing power to work so as to let down the surface.

If the plaintiff's contention in the present case is right, the owners of the coal under the wastes of Heanor and Codnor, which had been worked by them for many years before the Act of 1791, would under the provision therein contained that they might continue to work it and carry it away in as full and ample a manner as if the Act had not been passed, have been prevented

(1) [1919] A. C. 468. (2) 10 Q. B. D. 547; 9 App. Cas. 286.
(3) [1906] A. C. 305.

from exercising this right as they had been accustomed to do or at all, a construction of the statute which seems to me to be a sufficient answer to those contending that it should be adopted.

Before I pass from this case I would refer to the words of Lord Halsbury in *Quinn* v. *Leathem* (1), which not for the first time, I have found it advantageous to bear in mind. He says : "There are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it."

The result that I have arrived at is that the Act of 1791 expressly enacted that the owners of coal under the waste of the manor of Codnor should have the right to work and carry it away, that there is no practical method of doing so without causing subsidence, that the Legislature cannot be presumed to have intended that despite its express provisions there should be no exercise of the right, that the defendants do not threaten or intend to work in a manner differing in essentials from that practised in the district at and prior to the date of the Act, that this method is the one least harmful to the owners of the land, and that in those circumstances there is nothing in any of the authorities authorizing, or making it incumbent upon me, to grant the injunction asked for.

For these reasons I am of opinion that the plaintiff's case fails, and I must dismiss the action with costs.

Solicitors : *Field, Roscoe & Co., for Parr & Butlin, Nottingham ; Thicknesse & Hull.*

(1) [1901] A. C. 495, 506.

Considered. GREENHALGH v. ARDERNE CINEMAS [1951] 1 Ch. 286

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SIDEBOTTOM *v.* KERSHAW, LEESE AND COMPANY, LIMITED.

Company—Articles—Alteration—Power to expel competing Shareholders—Alteration effected for Benefit of Company as a Whole—Bona fides—Validity Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 13.

A private trading company, in which the majority of the shares were held by the directors, passed a special resolution to alter its articles by introducing a power for the directors to require any shareholder who competed with the company's business to transfer his shares, at their full value, to nominees of the directors. The plaintiffs, who carried on a competing business, held the minority of the shares, and had voted against the resolution. They brought an action for a declaration that it was invalid as against them :—

Held, that the company had power under s. 13 of the Companies (Consolidation) Act, 1908, to introduce into its altered articles anything that might have been included in its original articles, provided that the alteration was made bona fide for the benefit of the company as a whole. A power to expel a shareholder by buying him out was valid in the case of original articles, and could therefore be included in altered articles, subject to the same limitation :—

Held also, on the evidence, that the resolution was passed bona fide for the benefit of the company as a whole, and was therefore valid, and enforceable by the majority against the minority.

Allen v. *Gold Reefs of West Africa* [1900] 1 Ch. 656 and *Phillips* v. *Manufacturers' Securities, Ld.* (1917) 116 L. T. 290 followed. *Brown* v. *British Abrasive Wheel Co.* [1919] 1 Ch. 290 distinguished.

Decision of the Vice-Chancellor of the County Palatine of Lancaster reversed.

APPEAL from a decision of the Vice-Chancellor of the County Palatine of Lancaster.

The question arising upon the appeal was as to the validity of a resolution passed by the defendant company to alter its articles of association by providing (inter alia) that the directors (who held the majority of the shares) should have power to require shareholders who carried on business in competition with the company to transfer their shares, at their fair value, to nominees of the directors.

The plaintiffs, who were shareholders, brought this action for a declaration that the resolution was invalid and for an injunction to restrain the company from giving effect to it and treating it as valid.

Kershaw, Leese & Co., Ld., a private company, was incorporated in June, 1894, to acquire as a going concern the goodwill, etc., of an existing business of cotton spinners, doublers, and manufacturers at Heaton Norris in the county borough of Stockport. The nominal capital of the company was 80,000*l.*, divided into 4000 preference and 4000 ordinary shares of 10*l.* each, both classes of shareholders having the same voting power—namely, one vote for each share. The total number of shares issued was 7620, of which 4396 were held by the directors and 711 by the plaintiffs.

At extraordinary meetings of the company held respectively on June 6 and June 24, 1919, a special resolution was passed and confirmed to the effect that a certain printed document be adopted as the articles of the company in substitution for and to the exclusion of the existing articles. At each of the meetings the resolution was carried by a majority larger than sufficient to meet the statutory requirements, the only members voting against it being plaintiffs in the action.

Of the proposed new articles, art. 38 provided that no member should transfer his shares without first offering them to the directors at a price to be certified by the auditors. Article 40, the one complained of, was in the following terms: "In every case where shares are held by a person who carries on any business which is in direct competition with the business of the company, or who is a director of any company carrying on such business, the directors may at any time give to such person notice requiring him forthwith to transfer all such shares, and he shall thereupon be bound, upon payment of the fair value of the shares to be ascertained as stated in art. 38, to transfer the shares to such person or persons as the directors shall nominate."

Article 123 excluded the right of members to see the balance sheet of the company except at the ordinary general meeting. Under the corresponding old article shareholders had the right to inspect previous to the meeting at the offices of the company.

The plaintiffs carried on business in Manchester as merchants and shippers under the style of G. I. Sidebottom & Co. Their business was in direct competition with the business of the

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company within the meaning of art. 40. Both the plaintiffs' firm and the company dealt in similar kinds of cloth in the same localities in this country and abroad. This had not always been so, but the competition had been brought about owing to a recent enlargement of the scope of the company's business. The directors, however, in their evidence stated that they had never considered that the firm of G. I. Sidebottom & Co. was a firm competing in any way with the defendant company, and that they had no present intention of applying art. 40 to expropriate the plaintiffs. They further said that the only case they had in contemplation in voting for the adoption of the new art. 40 was the case of a Mr. Bodden, who held 70 shares in the company, and who was interested in two businesses which were in constant and keen competition with the company.

The Vice-Chancellor held that the power conferred by s. 13 of the Companies (Consolidation) Act, 1908, upon a company to alter or add to its articles was qualified by this, that a proposed alteration capable of being enforced upon a minority of the shareholders must be within the ordinary principles of justice, and must be for the benefit of the company as a whole; and, applying that test, he held that the proposed new article was invalid, inasmuch as it would enable the directors, who, in this case, held the majority of the shares to compulsorily expropriate a competing shareholder.

The company appealed.

Luxmoore K.C. and *G. B. Hurst* for the appellants. The question is whether the proposed new article is really for the benefit of the company as a whole. It applies to every shareholder, even the largest. There is no oppression of the minority by the majority. In *Borland's Trustee* v. *Steel Brothers & Co.* (1) a similar article was held to be valid.

Articles of this nature are very common in private companies: see Palmer's Company Precedents, 11th ed., Part I., pp. 970, 971, forms 320, 321. This article is not so drastic as many there referred to. If it had been included in the original

(1) [1901] 1 Ch. 279.

articles it would have been good and binding upon all the shareholders. Every shareholder joins the company with knowledge that the majority have power to alter the articles and the contract between the shareholders inter se.

The power to alter the articles is governed by s. 13 of the Companies (Consolidation) Act, 1908. That section is in very wide terms.

This case is covered by the decision in *Allen* v. *Gold Reefs of West Africa*. (1) There the alteration had a retrospective effect upon shares already issued.

In *Brown* v. *British Abrasive Wheel Co.* (2) Astbury J. held that an article enabling the majority to purchase compulsorily the shares of the minority on certain terms was not enforceable upon the minority. If sound, that decision is distinguishable from the present case on the ground that there the proposed article was adopted not for the benefit of the company as a whole, but in the interests of the majority only. The point was that the resolution was not passed bona fide for the benefit of the company as a whole.

[WARRINGTON L.J. referred to *Baillie* v. *Oriental Telephone and Electric Co.* (3)]

The issue of hardship upon individual shareholders is irrelevant: see the judgment of Lindley M.R. in *Allen* v. *Gold Reefs of West Africa*. (4)

The Vice-Chancellor was wrong in holding that no substantial advantage can accrue to the company from the new articles. It is prejudicial to the interests of the company that a competitor should have that insight which a shareholder possesses into the working of the company's business.

Jenkins K.C. and *Radford* for the respondents. A corporation is a distinct legal entity. Speaking of the benefit of the company as a whole, one means the benefit of all the shareholders. This resolution was not passed bona fide within the authorities. It was passed with the direct object of excluding one particular member—Mr. Bodden. A body of shareholders, because they disapprove of one particular member, cannot compulsorily

(1) [1900] 1 Ch. 656.
(2) [1919] 1 Ch. 290.
(3) [1915] 1 Ch. 503.
(4) [1900] 1 Ch. 656, 674.

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eject him. It is not for the benefit of the company as a whole that the majority should have the power of expelling a particular shareholder against his will. The company as a whole includes every individual shareholder. A company under the guise of a power to alter its regulations cannot say to a particular shareholder, you shall no longer remain a member. *Allen* v. *Gold Reefs of West Africa* (1) was a different case. There is a distinction between dealing with the way in which shares shall be held and giving a power of expulsion. An alteration in articles made for the purpose of getting rid of an individual shareholder cannot be passed bona fide. A general power of expropriation is not good, as Astbury J. has held in *Brown* v. *British Abrasive Wheel Co.* (2)

[EVE J. referred to *Phillips* v. *Manufacturers' Securities, Ld.* (3)]

That was the case of an original article. The question there was as to the exercise of the regulations of the company under the particular circumstances.

[LORD STERNDALE M.R. That case seems to be a decision that there may be a valid original article giving a power to expel; then *Allen* v. *Gold Reefs of West Africa* (1) deals with the question of alteration.]

The point in the present case is that the resolution was passed in order to get rid of Mr. Bodden as a shareholder, and therefore it was mala fide.

If *Brown* v. *British Abrasive Wheel Co.* (2) is right it covers this case. The benefit of the company was apparent there. Here it is quite shadowy. A shareholder cannot be expelled except by virtue of some power inherent in the original bargain of the shareholders inter se. In a company, more particularly a private company, the fundamental doctrines of partnership are imported. A partner cannot be excluded except by virtue of express agreement. The idea that a competing shareholder can learn much of the working of the company's business by merely seeing the balance sheet and attending the meetings is fanciful. It is said that the resolution was directed solely

(1) [1900] 1 Ch. 656. (2) [1919] 1 Ch. 290.
(3) 116 L. T. 290.

against Mr. Bodden; but assuming that it is equally aimed at the plaintiffs, it was not bona fide passed for the benefit of the company as a whole, is invalid, and cannot be enforced by the majority against the minority.

Luxmoore K.C. in reply.

LORD STERNDALE M.R. I do not say this is an entirely easy case, but I have come to the conclusion that the appeal must be allowed.

The question is as to the validity or invalidity of an alteration in the articles of association of the company. There were several articles that were altered, but there is only one in respect to which any question arises on this appeal, and that is art. 40. [His Lordship read the article and continued:] I need not consider the way in which the value is to be ascertained, because it was not argued that if the altered article were otherwise valid there was anything unfair in the method of the ascertainment of the value which would make it objectionable.

The circumstances in which the question arose were these. The company—Kershaw, Leese & Co., Ld.—is now a private company; it has altered its articles so as to bring it within the regulations necessary to constitute a limited company a private company. The plaintiffs are shareholders in the company to a substantial amount. They hold 711 shares. In their evidence they state that they are partners in a firm of G. I. Sidebottom, a firm which according to them is competing with the defendant company, Kershaw, Leese & Co. The learned Vice-Chancellor has found, and for the purposes of this appeal I accept his finding, that the plaintiff firm were in fact carrying on a competing business, and apparently that competition was brought about by the fact that the defendant company had enlarged its business, and had thereby set up a business which was competitive with that of the plaintiffs. But the defendants say that they were not aware that the plaintiffs were competing; they never considered them as a competing firm, and they did not know they did compete. I do not quite know if the businesses were the

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same, and if the defendants' officers and directors had applied their minds to it, how they could avoid finding out that the plaintiffs were a competing firm; but they say they did not so consider them, and the learned Vice-Chancellor has accepted the statement made on behalf of the defendants that they had not in their minds, at the time the resolution authorizing the altered article was passed, the position of the plaintiff firm at all. I accept those findings.

The position, therefore, stands in this way. The plaintiffs were in competition with the defendants, but the defendants did not introduce this alteration of the articles in any way in order to direct it against the plaintiffs at the time they introduced it, but their secretary says this: "For a year before the 29th May, 1919, the proposal to convene an extraordinary general meeting of the defendant company in order to amend the defendant company's articles of association was under frequent discussion at directors' meetings, and was in the hands of the company's solicitors. The proposal was always discussed partly with a view to bring the articles up to date and partly with the view to give the directors power if the necessity arose to terminate the membership of the company of Mr. Bodden, who is the registered holder of only 70 ordinary shares in the company, but who has, therefore, a right to attend the defendant company's meetings. The said Bodden is largely interested in two concerns with which the defendant company is in constant and keen competition—namely (1.) the said firm of John Mann & Co."—which had been mentioned in a previous part of the affidavit—"and (2.) Travis Brook Mills, Stockport. The said Bodden is a director of a company which owns the last-mentioned mills. Such mills adjoin the mills of the defendant company, and manufacture exactly the same classes of goods. The manager of the said mill is a former servant of the defendant company, and had been in close touch with the buying and selling of the defendant company's products." The directors of the defendant company say this: "The amendments in the defendant company's articles of association were drafted on our instructions by the company's solicitors partly to bring the articles up to date and partly also to give

the directors discretionary powers with regard to shareholders (if any) who might be interested substantially in competitive businesses and who might thus utilise information obtained by them as members of the defendant company to the detriment of the defendant company and the other shareholders thereof. More particularly we had in mind the case of Mr. Bodden, the facts of which are correctly stated in paragraph 6 of the said affidavit of the said Mark Blake Greenwood "—who was the secretary. Therefore the position was that the plaintiffs, as I have said, were a competing firm. The directors of the defendant company did not introduce this alteration in the article with any view of using it against the plaintiff firm, but they did introduce it with the view of using it if necessary against Mr. Bodden. Now it does not seem to me to matter, as to the validity of this altered article, whether it was introduced with a view of using it against the plaintiff firm or not, except to this extent, that it might be that if it had been introduced specially for the purpose of using it against the plaintiffs' firm some question of bona fides might possibly have arisen, because it might have been argued that it was introduced to do them harm, and not to do the company good. That is the only way in which it seems to me to be relevant. The same seems to me to be the case with regard to the position of Mr. Bodden. If the alteration were proposed with the intention of injuring Mr. Bodden only, or getting Mr. Bodden out of the company only, without any reasonable ground, and not for the benefit of the company, then again there would be, as it seems to me, a lack of bona fides, and in that way and in that way only Mr. Bodden's position is of importance. I quite agree with what was said in argument by the respondents' counsel, that if by reason of the relative position of Mr. Bodden and the defendant company's directors this was invalid against Mr. Bodden, it is invalid altogether. The question is whether it is invalid. It introduces a new power which did not exist in the original articles at all—a power to buy out on the terms mentioned in the article any shareholder who was engaged in a competing business. It is necessary to look at what the powers of alteration of the articles of association are.

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They are contained in s. 13 of the Companies Act of 1908, which corresponds with s. 50 of the Companies Act, 1862, and it seems to me—and I am fortified in this opinion by, and in fact I found it upon, the words of Lindley M.R. in *Allen* v. *Gold Reefs of West Africa.* (1)—that subject to the limitation which I shall mention a company can, under the powers of s. 13, introduce into its altered article anything that could have been in the original articles. What Lindley M.R. says is this (2): "The articles of a company prescribe the regulations binding on its members: Companies Act, 1862, s. 14. They have the effect of a contract (see s. 16); but the exact nature of this contract is even now very difficult to define. Be its nature what it may, the company is empowered by the statute to alter the regulations contained in its articles from time to time by special resolutions (ss. 50 and 51)." It is admitted that there is a prima facie right to put anything into an altered article which might have been in the original articles, subject to some limitation, and the limitations have been variously stated; but in my opinion they all come down to the same thing, which is expressed by Lindley M.R. in the same case, where he says: "Speaking generally, I am of opinion that the articles can be so altered," that was, altered as in that particular case, "and that, if they are altered bona fide for the benefit of the company, they will be valid and binding as altered on the existing holders of paid-up shares, whether such holders are indebted or not indebted to the company when the alteration is made." The point about indebtedness only refers to the particular facts of that case. The limitation is also stated by Astbury J. in *Brown* v. *British Abrasive Wheel Co.* (3), to which I shall have to refer later on, and it is stated by Lord Wrenbury in the 9th edition of his book on the Companies Act, at p. 25, that "Possibly the limitation on the power of altering the articles may turn out to be that the alteration must not be such as to sacrifice the interests of the minority to those of a majority without any reasonable prospect of advantage to the company as a whole." As I have said, this has been expressed in various other terms in

(1) [1900] 1 Ch. 656. (2) [1900] 1 Ch. 671, 672.
(3) [1919] 1 Ch. 290.

a number of cases. In *Brown* v. *British Abrasive Wheel Co.* (1), before Astbury J., it is called, I think, "the ordinary principles of justice," and the learned judge says (2): "The question therefore is whether the enforcement of the proposed alteration on the minority is within the ordinary principles of justice and whether it is for the benefit of the company as a whole." The learned judge speaks there as if those two were different things. I respectfully doubt the accuracy of it, because I think it is more accurately expressed by the passage I have cited from the judgment of Lindley M.R.: "If they are altered bona fide for the benefit of the company," and that the two things are not different things, but if they are bona fide for the benefit of the company they are consonant with the ordinary principles of justice. Of course that is excluding any question of fraud or malice, which is excluded by the words "bona fide." The learned Vice-Chancellor in this case adopted that passage from the judgment of Astbury J., and said that the enforcement of the proposed alteration must be within the ordinary principles of justice, and must be for the benefit of the company as a whole, but he also cited the passage from Lord Wrenbury's book, which seems to me to be more accurate, and to agree with the principle stated by Lindley M.R. Those, in my opinion, are the principles we have to apply to this case. There are two objections to this alteration: one is a very broad one indeed. It is that whatever alterations a company may be empowered to make in its articles varying the terms upon which its members may hold their shares, it cannot alter its articles so as to provide a means of what was called "expelling," as in this case, by buying out a particular member and making him cease to be a member. I cannot find that such an exception as that is anywhere stated in any of the authorities as existing, but I am also bound to say that I think Mr. Jenkins was right when he said that none of the cases cited to us are dealing with matters of direct expulsion as it is called, or direct buying out such as exists in this case, but there is no doubt—in fact I think it is established by *Phillips* v. *Manufacturers' Securities, Ld.* (3)—that a power such as this is a perfectly

(1) [1919] 1 Ch. 290. (2) [1919] 1 Ch. 295.
(3) 116 L. T. 290.

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valid power in the case of original articles, and it seems to me that prima facie if it could be in the original articles, it could be introduced into the altered articles provided only it is done bona fide for the benefit of the company as a whole. Therefore, in my opinion, it comes back to the same thing. The introduction into an altered article of a power of buying a person out or expelling him can only be held invalid if the alteration is not made bona fide for the benefit of the company. I should have been of that opinion without authority, but it seems to me that the point is really involved, although it was not argued, in *Allen* v. *Gold Reefs of West Africa*. (1) It is quite true that the power there was to impose a lien upon paid-up shares which, before the alteration, existed only with regard to shares which were not fully paid up. The result was that when that lien was imposed upon the paid-up shares it not only altered the position of the holder of the shares by imposing that lien, but it altered the position also by imposing upon him all the consequences of that lien which would probably have been imposed upon him without any express power, but which were by express power given in the altered articles, to sell his shares compulsorily if he did not satisfy the lien upon them; and therefore the result of that alteration was to give a power in a certain event to get rid of him as a member of the company altogether by compulsory sale of his shares. It is quite true the point was not argued, but knowing the learned counsel who argued that case and the learned judge who gave judgment, if it were a fatal objection to an alteration that it gave power to the company to get rid of a member, I can hardly think that such an objection would have been overlooked. I think therefore that that case is an authority against that proposition.

A second argument was addressed to us, which was this: I think Mr. Jenkins rather deprecated it being put in this form, but in my opinion this is what it came to: An alteration cannot be for the benefit of the company as a whole if in fact it is a detriment to one of the members of the company, because the company as a whole means the whole body of corporators and every individual corporator, and if one of them has detri-

(1) [1900] 1 Ch. 656.

ment occasioned to him by the alteration, it cannot be for the benefit of the company as a whole. I must say that I find it very difficult to follow that argument, but it seems to me to be exactly met by *Allen* v. *Gold Reefs of West Africa* (1), because undoubtedly the alteration that was made there was not for the benefit of the shareholder, of whom the plaintiff, Mr. Allen, was the executor, because it made his fully paid-up shares subject to a lien to which they were not subject before, and thereby, as I have pointed out, made it possible to get rid of Mr. Allen, or Mr. Allen's testator, altogether by compulsorily buying up his shares if the debt were not satisfied.

In my opinion, the whole of this case comes down to rather a narrow question of fact, which is this: When the directors of this company introduced this alteration giving power to buy up the shares of members who were in competing businesses did they do it bona fide for the benefit of the company or not? It seems to me quite clear that it may be very much to the benefit of the company to get rid of members who are in competing businesses. To a certain extent it is provided by art. 123 that the members are not to have too much knowledge of the affairs of the company, because although they may attend a meeting and hear the balance sheet and the report of the directors read, they may not have a copy of either of them, or take extracts from them. That the learned Vice-Chancellor has held to be a perfectly good article. There is no appeal on it, and I say nothing about it. It is a provision no doubt that prevents members having quite as full a knowledge of the business of the company as they would have in the absence of such an article, but I think there can be no doubt that a member of a competing business or an owner of a competing business who is a member of the company has a much better chance of knowing what is going on in the business of the company, and of thereby helping his own competition with it, than if he were a non-member; and looking at it broadly, I cannot have any doubt that in a small private company like this the exclusion of members who are carrying on competing businesses may very well be of great benefit to the company. That seems to me to be precisely a point which

(1) [1900] 1 Ch. 656.

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ought to be decided by the voices of the business men who understand the business and understand the nature of competition, and whether such a position is or is not for the benefit of the company. I think, looking at the alteration broadly, that it is for the benefit of the company that they should not be obliged to have amongst them as members persons who are competing with them in business, and who may get knowledge from their membership which would enable them to compete better.

That brings me to the last point. It is said that that might be so were it not for the fact that the directors and the secretary have said, "This is directed against Mr. Bodden," and therefore it is not done bona fide for the benefit of the company, but it is done to get rid of Mr. Bodden. If it were directed against Mr. Bodden from any malicious motive I should agree with that—the thing would cease to be bona fide at once; but these alterations are not as a rule made without some circumstances having arisen to bring the necessity of the alteration to the minds of the directors. I do not read this as meaning anything more than this: "It was the position of Mr. Bodden that made us appreciate the detriment that there might be to the company in having members competing with them in their business, and we passed this, and our intention was, if it became necessary, to use it in the case of Mr. Bodden; that is what we had in our minds at the time; but we also had in our minds that Mr. Bodden is not the only person who might compete, and therefore we passed this general article in order to enable us to apply it in any case where it was for the good of the company that it should be applied." It is a question of fact. I come to the conclusion of fact to which I think the Vice-Chancellor came, that the directors were acting perfectly bona fide; that they were passing the resolution for the benefit of the company; but that no doubt the occasion of their passing it was because they realized in the person of Mr. Bodden that it was a bad thing to have members who were competing with them. I confess I have this little difficulty in dealing with this point; that whereas the learned leading counsel for the respondents based his objection to

the alteration on the ground that it was directed against Mr. Bodden alone, and therefore was not generally for the benefit of the company, his learned junior based his objection to it on the fact that it was not directed against Mr. Bodden alone but against everybody who was competing. I think, if I may say so, that the learned junior was right in his apprehension of the position. It was directed against every competing person, and Mr. Bodden was only the occasion of the passing of the alteration of the article; but I do not think that that is any objection to its validity.

There is only one other thing I wish to say, and that relates to *Brown* v. *British Abrasive Wheel Co.* (1), which was decided by Astbury J. In that case the company was in financial difficulties. Two members of the company holding the vast majority of the shares were willing to provide capital if the other members of the company would sell to them their small proportion of shares, so that the majority shareholders should have the whole company and the whole benefit of the transaction. It was said that the only alternative to getting the capital was a winding up, and as the minority shareholders refused to sell their shares, the majority shareholders introduced an article—an altered article—by which power was given them to buy the shares of the minority shareholders. Astbury J. held that that was an invalid article, and he held it, it seems to me, because he came to a directly opposite conclusion on the matter of fact in that case to that which I have come to upon the circumstances of this case. He found as a fact that the majority shareholders, although the only alternative in the matter was a winding up of the company altogether, were not doing this for the benefit of the company or in the interests of the company at large, but entirely for their own benefit, and in their own interests. If that finding be right, and as to that I say nothing, it was not bona fide; it was not done for the benefit of the company, but for the benefit of themselves; and if that was a right finding, the conclusion at which the learned judge arrived in law would, I think, also be right. But in this case I come to an entirely opposite

(1) [1919] 1 Ch. 290.

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conclusion—namely, that this resolution was passed bona fide for the benefit of the company—not directed from any personal motives against Mr. Bodden, but Mr. Bodden being merely in the position, as I have said, of the occasion which gave rise to the alteration.

For these reasons I think this is a valid article. I think the alteration was within the competence of the company, and therefore this appeal must be allowed with costs here and below.

WARRINGTON L.J. I am of the same opinion. The defendant company is a private trading company. It has hitherto been governed by articles of association adopted at the time of its incorporation, but it has recently, in exercise of a power conferred by s. 13 of the Companies (Consolidation) Act, 1908, adopted new articles of association. Among the articles so adopted is art. 40, which is as follows: [His Lordship read the article and continued:] Then by art. 38 the price is to be such a price as the auditors for the time being of the company certify in writing to be the fair value thereof. The plaintiffs contend that this article is unenforceable and invalid, and the Vice-Chancellor has made a declaration to that effect, and the company appeals.

A person taking shares under the Companies (Consolidation) Act of 1908 enters into a bargain, the exact nature of which as pointed out by Lindley M.R. it is rather difficult to define; but whatever its terms may be, it is at all events a bargain which involves, as one of its terms, the statutory liability to alteration by a resort to the powers of s. 13 of the Act. With regard to that, Lindley M.R. in *Allen* v. *Gold Reefs of West Africa* (1) states the principle to be this. After referring to the position of shareholders under the articles, and to the power of alteration which was then contained in s. 50 of the Act of 1862, he goes on: "Wide, however, as the language of s. 50 is, the power conferred by it must, like all other powers, be exercised subject to those general principles of law and equity which are applicable to all powers conferred on majorities

(1) [1900] 1 Ch. 656, 671.

and enabling them to bind minorities. It must be exercised, not only in the manner required by law, but also bona fide for the benefit of the company as a whole, and it must not be exceeded. These conditions are always implied, and are seldom, if ever, expressed. But if they are complied with I can discover no ground for judicially putting any other restrictions on the power conferred by the section than those contained in it. How shares shall be transferred, and whether the company shall have any lien on them, are clearly matters of regulation properly prescribed by a company's articles of association." The first contention raised before us was that a power which is virtually a power to expel a member upon terms—to get rid of a member as a shareholder—is one that cannot be introduced into articles of association by an alteration made under s. 13. It is conceded, and, in fact, it could not be contended otherwise, that such a power might be inserted in the articles of association as originally framed. That, I think, would clearly be a matter of regulation, the regulation of the relative position of the shareholders with the corporate entity called the company. That such a provision if inserted in the original articles would be valid follows from the decision in *Phillips* v. *Manufacturers' Securities, Ld.* (1) In that case the articles contained a provision "that the company in general meeting might by resolution passed by the requisite majority determine that the share of any member shall within 30 days of the passing of such resolution be offered for sale by the company to the other members, and any such resolution may fix the price to be paid for such shares, provided that such price shall not be less than 1*s.* per share, and in case no such price shall be so fixed, the price shall be 1*s.* per share." The company had, by resolution purporting to be passed under that article, enforced the article against a particular shareholder, and compelled him to sell at 1*s.* per share. The action was brought for an injunction to restrain the company from carrying that into effect, and in the result the Court of Appeal refused the relief asked for by the plaintiff. The Court came to the conclusion that the resolution was

(1) 116 L. T. 290.

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within the article. It came to the conclusion that the resolution having been passed bona fide and without fraud, the article gave it the necessary effect, and the plaintiff was therefore not entitled to relief. Now it is quite plain that an article providing for the compulsory sale by a member of the company of his shares is good if it is contained in the original articles; that is to say that it is a regulation of the company within the meaning of the statute. If that be so, and if such an article could be a regulation of the company within the meaning of the statute, then it is equally plain that it is one of the things which may be introduced by an alteration effected by special resolution, because the very object of s. 13 is to enable a company to make new regulations, that is to say, to do by an alteration what might have been done by the original articles. A very good illustration of what I mean in that respect is given by the judgment of Lindley L.J. in *Andrews* v. *Gas Meter Co.* (1) In that case a special resolution under s. 50 of the old Act had created preference shares, and it was contended that that resolution was invalid and ineffectual to attach a preference to any shares. The Court of Appeal decided that that was not so, reversing or overruling a well-known decision in *Hutton* v. *Scarborough Cliff Hotel Co.* (2) It is interesting to see how Lindley L.J. worked out the conclusion at which he arrived. He did it in this way. In effect he said that unless there is something in the memorandum to the contrary, a provision in the articles of association giving a preference to a particular class of shareholders would not be contrary to the memorandum of association, and therefore would be a valid article of association. Further, going on to the case with which he had to deal, if it would be a valid article of association, then it would be valid if passed under a power of alteration conferred by s. 50. In other words, what can be done by s. 50, or s. 13 as it is now, is what may be done by the original articles of association.

Having got so far, that leaves as the only question to be decided whether the power itself was exercised bona fide for the benefit of the company. In the present case the object

(1) [1897] 1 Ch. 361. (2) (1865) 2 Dr. & Sm. 514, 521; 4 D. J. & S. 672.

of the article was to enable this private trading company to get rid as a shareholder of any member who was either carrying on a business in direct competition or who was a director of any company carrying on a business in direct competition. That is the object of it. Now, looking at it from the point of view of the ordinary business man engaged in trade, might he not quite well take the view that it would not be to the advantage of this private company—which is, after all, in many respects like a private firm, although not so in law—or rather that it would be to the disadvantage of this private company that one of its members should be carrying on a business in direct competition, or be a director of a company carrying on business in direct competition? That membership of the company gives some opportunities, possibly, according to the constitution of this body, not very great opportunities, of getting behind the scenes and knowing what the company is doing, there can be no doubt, and it might be greatly to the disadvantage of the company that knowledge so acquired should be exercised by a competitor. Therefore it is desirable that, if there was reason to suppose that it would be exercised, they should have power to remove that competitor from his advantageous position of shareholder. If that be so, and there being in this case no suggestion of fraud, it seems to me that the only inference one can draw is that the company were, in passing this special resolution, acting bona fide for the benefit of the company at large. It may be that a particular course may be to the disadvantage of some individual shareholder; but, notwithstanding that, it might still be for the benefit of the company at large that that course should be pursued. But it is then said that this step was taken with the special object of ridding the company of a particular shareholder, whose name is given in the affidavits, who was known to be a competitor, and that for that reason the resolution was not passed bona fide. I am entirely unable to follow that. I have no doubt that the fact that there was this competitor, and probably the knowledge that he was doing harm to the company, awoke the directors to the disadvantage in which they were placed by having such a man

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as one of their shareholders; that may well be, and that they passed this resolution having had their attention called to it by the position of Mr. Bodden; but that is a very different thing from saying that they passed this resolution with the mala fide and dishonest intention of getting rid of a shareholder whom they did not wish to remain in the company. That was not so at all, and I think that the fact that Mr. Bodden was in their minds when they proposed this alteration does not in the least prevent it from still being passed bona fide for the benefit of the company.

I only wish to say one word about *Brown* v. *British Abrasive Wheel Co.* (1) I think that the principle upon which Astbury J. professed to act would have appeared more clearly if he had not confused himself by seeming to suggest that "bona fide" and "for the benefit of the company" were two separate things in the exposition of law as given by Lindley, M.R. However, that case really depends upon a finding of fact by Astbury J.—namely, that in that particular case what was done was not for the benefit of the company, but for the benefit of certain particular shareholders—namely, those who held the majority of shares; and having come to that conclusion of fact then the rest of it followed as a proper conclusion of law. Whether he was right or not in coming to that conclusion of fact is another matter, and as to that I do not think it is necessary for me to say anything.

The result is in my opinion this appeal succeeds, and the judgment of the Vice-Chancellor must be discharged.

EVE J. I am of the same opinion. It is, I think, conceded, or, if not conceded, it is certainly established by the decision of this Court in *Phillips* v. *Manufacturers' Securities, Ld.* (2), that an article in the terms of art. 40 might have been inserted in the articles of the company as originally framed, and that its terms would not have been contrary to ordinary principles of justice, or oppressive, or not for the benefit of the company. By s. 13 of the Act of 1908 a statutory power has been conferred on the company of altering its articles, and

(1) [1919] 1 Ch. 290. (2) 116 L. T. 290.

assuming that power to have been exercised regularly modo et forma, its exercise in my opinion can be held to be contrary to ordinary principles of justice only in cases where mala fides in its exercise has been established.

That brings one to the question what is meant by mala fides in this connection. Speaking for myself, I do not think the solution of that question is assisted by the use of such phrases as "the ordinary principles of justice," "just and equitable," or "oppressive." I prefer the formula which I think was adopted by Lindley M.R., and I put it in this way: "Was the resolution adopted, or was the alteration made for the benefit of the company or for the benefit of some section of the company, without reference to the benefit of the company as a whole?" I do not understand that Mr. Jenkins objected to that being the test which had to be applied. His point was that the circumstances here do not satisfy that test, because, he says, this resolution was provoked and this alteration was brought about by the presence of an individual shareholder of whom the majority wished to rid themselves, and when they introduced this article it was with the object of benefiting all the shareholders in this company other than the shareholder who was to be turned out, and it could not, therefore, be said to be a resolution for the benefit of the company as a whole. I fully admit that where it is established that an alteration is adopted for the particular purpose of getting rid of an individual shareholder, that circumstance may furnish evidence of mala fides; but I demur altogether to the suggestion that it constitutes mala fides; and that seems to me to be the point at which Mr. Jenkins' argument breaks down. It is in my opinion quite impossible to say that because a state of circumstances had arisen which led the persons responsible for the management of this company, and the majority of the shareholders, to come to the conclusion that it ought to be put an end to, they were acting in bad faith when they adopted the obvious means of best putting an end to it. I think, further, that what was done in *Allen* v. *Gold Reefs of West Africa* (1) and in *Phillips* v. *Manufacturers'*

(1) [1900] 1 Ch. 656.

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Securities, Ld. (1), shows that in this Court on two occasions in which the alteration was upheld and relief refused to the complaining shareholder, there existed circumstances which showed that the result of the alteration was to prejudice the individual shareholder; but in each case it was held that the existence of that fact did not prevent the resolution or the alteration being treated as passed or adopted in perfect good faith. I think therefore that the suggestion that this resolution, because it was aimed at a particular shareholder, was passed mala fide fails, and that with that goes the substratum of the argument on behalf of the respondents.

I agree that this appeal should be allowed, and the action dismissed with costs here and below.

Appeal allowed.

Solicitors for appellants: *Busk, Mellor & Norris, for Vaudrey, Osborne, & Mellor, Manchester.*

Solicitors for respondents: *Collyer-Bristow & Co., for Sale & Co., Manchester.*

(1) 116 L. T. 290.

G. A. S.

SARGANT J.

1919

April 29.

In re ANDERSON.
HALLIGEY *v.* KIRKLEY.

[1919 A. 177.]

Will—Construction—Tenant for Life and Remainderman—Tenant for Life to be at Liberty "to use and occupy" Residence "for her own personal use and occupation," and also the Furniture therein—Effect of Sale—"Beneficially entitled to possession"—Settled Land Act, 1882 (45 *&* 46 *Vict. c.* 38), *s.* 2, *sub-s.* (5); *s.* 58, *sub-s.* (1.), *clauses* (vi.) *and* (ix.).

A testator by his will directed that his widow should, during life or widowhood, be entitled "to use and occupy" his residence "for her own personal use and occupation," and also the furniture in or about the same. The wife never lived at the house, and when it was sold by the trustees of the will she joined as party to the conveyance, which recited that she had signified her intention of not wishing to use the house as a residence, and was willing to renounce such right and to join in the conveyance:—

Held, that on the construction of the will she was not entitled to let the house and receive the rent or to receive the income of the proceeds of sale, but had only an option, liberty, or licence to occupy the house personally; and that, before the widow could claim to be a tenant for life or a person having the powers of a tenant for life within the meaning of the Settled Land Act, 1882, she must have exercised the option by informing the trustees that she desired to reside in the house.

Held, also, that she was not entitled to the income of the proceeds of furniture which had been sold.

By his will (made in 1897) Charles W. Anderson (who died in 1906) appointed his cousin, James Kirkley, executor and trustee thereof, and gave all his realty and residuary personalty unto and to the use of Kirkley, upon trusts for sale and conversion, payment out of the proceeds of funeral and testamentary expenses, debts and legacies, and investment of the surplus. The trustee was to hold the residuary moneys and the investments thereof upon trust to pay the income to James Kirkley during his life, and, after the death of the survivor of the testator's wife and Kirkley, the testator directed that the trust premises should be held upon such trusts and in such manner as Kirkley should by deed or will appoint, so only that every such appointment should be made in favour of some child or grandchild of Kirkley. In default of appoint-

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ment as aforesaid there was a trust for the child or children of Kirkley, and then followed a proviso under which he had power, notwithstanding the trusts thereinbefore contained subsequently to the trusts in his own favour for life, by deed or will to appoint the annual income, to accrue due after the decease of the survivor of himself and the testator's wife, of the trust premises or any part thereof to any wife surviving him for her life or for any estate determinable before or on her death.

Anderson's wife predeceased him, and on his death Kirkley, as tenant for life, entered into possession of the estate. This comprised a mansion house and the grounds occupied therewith, containing about 9 acres, called Cleadon Park, about 138 acres of land adjoining, and the farm buildings thereon known as Cleadon Park Farm, and also a considerable quantity of furniture and other household effects in or about the mansion house.

Kirkley died on May 26, 1916, having by his will (made in 1909) appointed executors and trustees. By the same instrument, in exercise of the powers for that purpose given by Anderson's will, Kirkley directed and appointed that the trustees for the time being of that will (thereinafter called " the Anderson trustees ") should from and after his death stand possessed of the trust premises subject to the power of appointment (thereinafter called " the Anderson estate ") upon trust out of the annual income thereof to pay to his wife Agnes Emily Kirkley, so long as she should remain his widow, the sum of 6000*l.* per annum (reducible to 500*l.* per annum if she married again), and, subject thereto during the life of his said wife, to pay and divide the balance, if any, of such income unto and amongst all his children living at his death who should attain twenty-one.

Then followed a special direction to the Anderson trustees and his own trustees that during her life or widowhood his wife Agnes Emily Kirkley should " be at liberty to use and enjoy " all or any of his residences, including Cleadon Park, " for her own personal use and occupation," and also all the motors, carriages, carriage horses, garages, coach-houses,

stables, wines, household goods, stores, and all household and other effects in or about such residence or residences.

Kirkley made a codicil to his will, by para. 3 whereof he recommended, without imposing any legal or binding obligation on the persons concerned, that Cleadon Park should be retained as a family residence, and by clause 7 whereof he bequeathed his household furniture, plate, and other articles of that kind which might be in or about any house or houses he should be occupying as his residence or residences at the time of his decease upon trust that his wife should be permitted to use and enjoy the same during her widowhood, the trustees keeping an inventory thereof.

Kirkley at the time of his death had no residence except Cleadon Park, which was still in his personal occupation. The farm had been let to a tenant.

Kirkley left surviving him his wife Agnes Emily Kirkley and also six children, all of whom attained the age of twenty-one years.

Shortly after Kirkley's death his widow ceased to occupy the mansion house and grounds known as Cleadon Park, and they remained unlet and unoccupied until they were sold.

In December, 1918, the Anderson trustees sold the same house and grounds and also the farm to the corporation of South Shields for 13,814*l.*, and by an indenture dated December 21, 1918, and made between the trustees of the first part, Mrs. Kirkley of the second part, and the corporation of the third part, the property sold was conveyed to the corporation. This deed recited both the wills; that Mrs. Kirkley had signified her intention of not wishing to use Cleadon Park according to the terms of the will and was willing to renounce such right and to join in the conveyance in manner thereinafter appearing; and that the vendors, in exercise of their powers as trustees, had agreed to sell the fee simple of the Cleadon Park estate, and the purchaser had contracted to purchase the same. The deed witnessed that the vendors conveyed as trustees in exercise of their powers under Anderson's will and of all other powers, and that Mrs. Kirkley, in pursuance of her

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intention aforesaid, confirmed and released unto the purchasers in fee simple.

The purchase money was attributed, as to about 5788*l.*, to the house and grounds, and as to the balance of about 8026*l.* to the farm.

After Kirkley's death the same trustees sold furniture, included in the Anderson estate, at Cleadon Park for about 700*l.* The remaining furniture and household effects at Cleadon Park were removed and either sold by Mrs. Kirkley or stored.

An originating summons was taken out by the persons who were trustees of Anderson's will and trustees and executors of Kirkley's will against Mrs. Kirkley, four of the remaindermen, the trustees of the settlement of the share of another remainderman, and the personal representative of the other remainderman, for the determination of the question whether, on the construction of Kirkley's will, his widow was entitled, during her widowhood, to the income arising from the investments of the proceeds of sale of (*a*) so much of the Cleadon Park estate as was included in the description of " my residences including Cleadon Park," and (*b*) the motors, carriages, carriage horses, household goods, stores, and household and other effects which were in or about the residence Cleadon Park at the time of Kirkley's death, and which had been, or might from time to time be, sold—or to any and what part of such income.

Heckscher for the plaintiff stated the facts and the questions involved.

A. Grant K.C. and *R. L. Ramsbotham* for the widow. Mrs. Kirkley's right to use and occupy Cleadon Park included the right to let the house and receive the rent paid by the tenant: *Rabbeth* v. *Squire* (1); *Mannox* v. *Greener*. (2) This case is distinguishable from *May* v. *May* (3), in which the right was limited to residence. Mrs. Kirkley is " beneficially entitled to possession, and is either a tenant for life within s. 2, sub-s. (5), of the Settled Land Act, 1882, or is a person having the

(1) (1859) 4 De G. & J. 406. (2) (1872) L. R. 14 Eq. 456.
(3) (1881) 44 L. T. 412.

powers of a tenant for life within s. 58, sub-s. (1), headings (vi.) or (ix.) of the same Act.

She is therefore entitled to receive the income of the investments of the proceeds of sale of Cleadon Park, and also of the furniture: *In re Baroness Llanover's Will* (1); *In re Boyer's Settled Estates.* (2)

Tebbs for the persons entitled in remainder. The widow's right is a mere personal one to reside at Cleadon Park, and this does not include the right to let and receive the rent: *May* v. *May.* (3) Her joinder in the conveyance of Cleadon Park amounted to a renunciation of her right to reside there, and by that renunciation she ceased to be either a tenant for life or a person having the powers of a tenant for life within the meaning of the Settled Land Act, 1882. She is not entitled to receive the income of the investments of the proceeds of sale of either the land or the furniture.

SARGANT J. [after stating the questions raised by the summons and the facts, and that upon the true construction of Kirkley's will and codicil the gift of chattels and effects did not, in his opinion, apply to such of the chattels and effects as formed part of the estate of Anderson, but that, if the gift in the codicil did include those chattels and effects, he did not think that any real difference was caused by that circumstance, continued:] What happened after Mr. Kirkley's death was this: Mrs. Kirkley shortly afterwards—the exact time is not stated, but I understand that it was within six weeks or two months—ceased to occupy Cleadon Park. I understand she went to live at Hastings, or at any rate is living there now. Cleadon Park has since then remained unlet and unoccupied. It is clear that she did not avail herself of the opportunity given to her by her husband's will of personally occupying his residence. In December, 1918—rather more than two and a half-years after Mr. Kirkley's death—the trustees of Mr. Anderson's will sold the whole of the Cleadon Park estate (comprising both the mansion house and the farm) to the corpora-

(1) [1902] 2 Ch. 679; [1903] 2 Ch. 16.
(2) [1916] 2 Ch. 404.
(3) 44 L. T. 412.

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tion of the county borough of South Shields. The purchase price was between 14,000*l.* and 15,000*l.*, and of that price roughly about 6000*l.* represented the value of the mansion house, which the widow had the right of occupying, and about 8000*l.* or 8500*l.* represented the value of the farm. [His Lordship then referred to the conveyance, and particularly to the recitals and witnessing part of it, and continued :] At the same time a certain amount of furniture, which formed part of what had been left by Mr. Anderson as part of the effects which the widow had the right to enjoy together with the mansion house, was sold, and the purchase money for that, 700*l.* or 800*l.* or thereabouts, has been received by the trustees, but a very much more valuable part of the furniture, which I am told may be of the value of 15,000*l.*, has been retained by the trustees, and the widow has had the use and enjoyment of that down to the present time. It may be, however, that some of that will be sold in the future, and what I have to decide with regard to the furniture affects not only the insignificant portion which has been sold but also the much larger portion which remains unsold.

The widow claims to be entitled (1.) to the income of the 6000*l.* or thereabouts which represents the purchase money of the mansion house ; (2.) to the income of the proceeds of sale of the furniture that has already been sold ; and (3.) to the income of the proceeds of sale of any furniture that may hereafter be sold.

I have to consider the case, first of all, apart from the Settled Land Act, and, secondly, with regard to any alterations in the law alleged to be introduced as the result of that Act. As regards the law independently of the Act, it seems to me that the terms of Kirkley's will are perfectly plain, and that he has merely given to his widow, in addition to the annuity of 6000*l.* a year, an option, liberty or licence to occupy personally by herself any one or more of his residences, but has not given her anything beyond a personal right of occupation. Does such a gift of a personal right of occupation carry with it the right to let to another person and to receive the profits of the letting or the right in case of a sale to receive the income of

the proceeds of sale as an equivalent or substitution for the right of personal occupation? In my judgment, neither on principle nor on authority can such a claim be sustained. The very clear words of the will, looking at the question apart from authority, prescribe that the lady is to have the right of personal use and occupation; the words are "shall be at liberty to use and enjoy all or any of my residences for her own personal use and occupation." It appears to me quite clear that those words, apart from the decisions, merely give her a personal right to live in the house—to reside in it—if she thinks fit. Whether, if she were living in the house generally, permanently, that would preclude her from letting it for short periods furnished is a question which has not arisen and which I do not consider at all.

Is there anything in the authorities cited to displace that view? In my judgment there is not. The authorities rather support the conclusion at which I have arrived. In *Rabbeth* v. *Squire* (1) Lord Chelmsford L.C. decided that a gift by will of the joint use and occupation of lands did not require personal use and occupation but permitted the donees to let the lands. But he pointed out that that was the effect of the gift of the use and occupation, and especially that there was nothing in the terms of the other parts of the will that would reduce that general right to a right of personal use and occupation. It seems to me to be clear that if, either in consequence of the context or by virtue of the terms of the original gift, what had passed to the claimant had been the right of personal use and occupation, the decision of Lord Chelmsford would have been the other way.

In the same way, in *May* v. *May* (2) Fry J. decided that a power given to a testator's wife to reside in the testator's house did not include a right to her to let the house and receive the profits. On the other hand, in *Mannox* v. *Greener* (3) a "free occupancy" of a house was held to allow letting; but that does not seem to be so analogous to the present case as the others which I have dealt with. The

(1) 4 De G. & J. 406. (2) 44 L. T. 412.
(3) L. R. 14 Eq. 456.

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reasoning in *Rabbeth* v. *Squire* (1) and the decision in *May* v. *May* (2) really render it indisputable that a gift of a right personally to use and reside in a house cannot carry with it the right to live elsewhere and to let the house and receive the rents.

Then comes the question whether any difference has been made by the Settled Land Acts. It appears to me that, before the widow could claim to be a tenant for life, or a person who had the powers of a tenant for life, with reference to this residence, it was necessary for her to exercise the option or right which was given to her, of residence in the house. If she had told the trustees that she had desired to reside in it and had proceeded to reside in it, I think she would probably from that time forward have been in the position of a person who was tenant for life, or a person having the powers of a tenant for life—probably a tenant for life. The case would, in my opinion, have then been within *In re Boyer's Settled Estates* (3), and also within the much more important decision in *In re Baroness Llanover's Will* (4), in which later case it appears on the facts that the lady had ever since the death of the testatrix been residing in the house in question. But in the present case everything that the widow has done has been in the direction of declining to avail herself of the privilege or option given to her by the will. As soon as was reasonably possible she ceased to reside in the house. She has left it empty and unoccupied ever since; she has resided elsewhere; and when the sale came to be negotiated she concurred in a deed which expressly stated that she had signified her intention of not wishing to use Cleadon Park as a residence according to the terms of Mr. Kirkley's will, and that she was willing to renounce such right. It appears to me, under those circumstances, that she is in the same position with regard to the house as if the testator had never given her this option or right of personal residence. She has not chosen to avail herself of it—no doubt for very good reasons. It may well be that residence

(1) 4 De G. & J. 406.
(2) 44 L. T. 412.
(3) [1916] 2 Ch. 404.
(4) [1902] 2 Ch. 679; [1903] 2 Ch. 16.

in a house of that character may carry with it pecuniary obligations rendering it undesirable that she should avail herself of the privilege of occupation, and turning that privilege if exercised into what might be a serious detriment to her.

In my opinion, therefore, the foundation on which any argument under the Settled Land Acts could be based does not exist, and I can find nothing, either in the will or in the Settled Land Acts, which has the effect of giving to her, in substitution for the privilege conferred on her by the will, the right to receive the income of the proceeds of sale of the house.

The question as to the furniture which has already been sold appears to me to stand in the same position. Here again the widow was given the right of personal enjoyment, and it was probably intended that she should use the furniture in conjunction with the house. Her rights as regards the furniture are rights of personal enjoyment only, and on the furniture being sold it appears to me that her rights vanish, and that she does not get a corresponding right to enjoy the income of the proceeds of sale.

It may be that, with regard to the much more valuable furniture which has been retained unsold, and which the widow is enjoying at present, she is in a position, in case she does not wish to keep the whole of that furniture, to make some arrangement with the remaindermen—which will have to be sanctioned by the Court so far as it relates to the interests of those who are under disability—under which, if the furniture is sold, the income of the proceeds shall be hers during the rest of her life. But that is an entirely different matter, with which I am not now dealing.

Solicitors : *Halligey & Co. ; R. E. Hill.*

F. E.

SARGANT J.

1919

May 28, 29.

In re WOOLF.

PUBLIC TRUSTEE *v.* LAZARUS.

[1919 W. 190.]

Will—Construction—Gift of Income on Trust to apply all or any Part for Maintenance—Accumulations of Income—Unapplied Income—Accretions to Capital.

By her will, a testatrix who died in 1915 gave her residuary estate upon trust to pay or apply or any part of the income thereof towards the maintenance and education or otherwise for the benefit of her granddaughter F. until she attained 21 or married, and, if she attained 21 without having previously married, to pay the income to F. during her life, and, if she married before or after attaining 21, to pay the income of one moiety of the residuary estate to F. during the remainder of her life, and to pay or apply the income of the other moiety towards the maintenance of J., and after the deaths of F. and J. respectively, to hold the respective moieties upon trust for their children respectively. F. married in 1917 and attained 21 in 1918:—

Held, that accumulations of unapplied income of the residuary estate existing at the date of the marriage formed part of the capital of the residuary estate, and did not pass to F.

By her will, dated October 16, 1913, Frances Woolf appointed executors and trustees, and by clause 3 thereof she gave to her trustees her jewellery, upon trust to sell the same and invest the proceeds, and also the sum of 2000*l.*, which she bequeathed to them, and declared that the trustees should hold the investments, upon trust to accumulate the income thereof until her granddaughter Frances Myers should attain the age of 21 years or marry previously, and from and after such event should pay the income of the said trust premises to her during her life for her separate use, without power of anticipation during any coverture, and from and after her death should hold the capital and future income of the said trust premises in trust for all or any the children or child of her said granddaughter who being male should attain the age of 21 years, or being female should attain that age or marry under that age, and if more than one in equal shares, and that, if there should be no such child who should attain a vested interest in the said trust premises, the same should fall into and form part of her residuary estate.

By clause 4 of the will the testatrix devised and bequeathed her residuary estate, whether real or personal, to her trustees, upon the usual trusts to sell, convert the same, and invest the proceeds, and declared that the trustees should hold the investments and property for the time being representing her residuary estate, upon trust to pay or apply all or any part of the income of her residuary estate in or towards the maintenance and education or otherwise for the benefit of Frances Myers until she should attain the age of 21 years or marry under that age, and, if she should attain the age of 21 years without having been married, upon trust thereafter to pay such income to her during her life until she should marry, but so that she should not have power to anticipate the said income.

Clause 5 of the will provided that, if and when Frances Myers should marry, either before or after she should attain the age of 21 years, the trustees should pay the income of one moiety of the residuary estate to her during the remainder of her life for her separate use, without power of anticipation during any coverture, and should pay the income of the other moiety to, or for the maintenance, education or otherwise for the benefit and support of the testatrix's granddaughter Ivey Myers during her life.

Later clauses of the will provided that, after the death of Frances Myers, one moiety of the residue should be held in trust for her children who being male should attain the age of 21 years, or being female should attain that age or marry, and if more than one in equal shares; and that, after the death of Ivey Myers, the other moiety should be held in trust for her children who, being male, should attain the age of 21 years, or being female should attain that age or marry, and if more than one in equal shares, and that, if either Frances Myers or Ivey Myers should die without leaving any children who should attain a vested interest in her share, her moiety should be held upon the trusts thereinbefore declared of the other moiety.

The will also provided that, while Frances Myers should be under the age of 21 years and unmarried, the trustees might, at any time or times and for any period or periods, in their

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absolute and uncontrolled discretion, apply such part of the income of her residuary estate as they might think fit, but not exceeding in the whole 50*l.* in any one year, in or towards the maintenance, education or benefit of Ivey Myers.

By the third codicil, dated March 31, 1915, to her will, the testatrix declared that her trustees should, out of the income of her residuary estate, pay or apply the sum of 1*l.* per week for or towards the maintenance, education, clothing, and benefit of Ivey Myers from and after the time when she should attain the age of 18 years, and this allowance was to continue until she became entitled to one moiety of the income of the residuary estate in the events mentioned in the will. After Ivey Myers attained 21 or married the allowance was to be paid to her personally. Lastly, if both Frances Myers and Ivey Myers should die without leaving any issue who should attain vested interests in the residuary estate, the testator declared that such residuary estate should be held for her grandson Lewis Michael Myers if he should be living when the trusts of the residuary estate should fail and determine.

The testatrix died on April 14, 1915. Her trustees sold the jewellery for about 1500*l.*, which sum, together with the legacy of 2000*l.*, they invested, the settled legacy mentioned in clause 3 of the will amounting to about 3500*l.* The value of the residuary estate was about 4527*l.*

Frances Myers attained the age of 21 years on April 6, 1918, but before that date—namely, on December 24, 1917—she was married to Bernard A. M. Lazarus. She lived with and was maintained by the testatrix from the age of 4 years until the death of the testatrix. Her sister, Ivey Myers, who was born in 1902, and her brother, Lewis M. Myers, who was born in October, 1898, lived with and were brought up by their mother.

At the date of the marriage of Mr. and Mrs. Lazarus the accumulations of income during the period between that date and the death of the testatrix, in respect of the settled legacy, amounted to about 305*l.*, and the accumulations of income in respect of the residuary estate, during the same period, amounted to about 527*l.*

The trustees took out an originating summons, to which

the three above-named grandchildren of the testatrix were joined as defendants, for the determination of the questions (1.) whether the accumulated income of the settled legacy belonged to Mrs. Lazarus or formed part of the corpus of that legacy, and (2.) whether the accumulated income of the residuary estate belonged to Mrs. Lazarus or formed part of the corpus of the residuary estate.

Russell Gilbert for the plaintiffs.

H. Terrell K.C. and *Byrne* for Mrs. Lazarus. To the accumulations of income on the settled legacy Mrs. Lazarus is absolutely entitled. Her life interest is a vested one, and the trust is to pay her "the income," not "the future income." *In re Wells* (1); *In re Humphreys* (2); *In re Scott* (3); *In re Bowlby.* (4)

The corpus of the residuary estate is vested by the gift of the whole or any part of the income for maintenance, and Mrs. Lazarus is entitled to the accumulations of income in respect of this also: *In re Williams* (5); *Fox* v. *Fox* (6); *In re Hume* (7); *In re Parker* (8); *Hanson* v. *Graham.* (9)

H. H. King (not called on as regards the accumulations of the income of the settled legacy) for the other grandchildren. As regards the second question: If Mrs. Lazarus had died before attaining 21, she would have been entitled only to so much of the income for maintenance as the trustees thought fit to allow her. Although a trust to apply the whole or any part of the income for maintenance may vest the corpus, it does not follow that the legatee will be entitled to the unapplied income; the income in that case may reach the same destination as the corpus: *Atkins* v. *Hiccocks* (10); *In re Kirkley* (11); *In re Bowlby* (4); *Green* v. *Ekins* (12); Hawkins on Wills, 1st ed., p. 223.

[*In re Wintle* (13) was also cited.]

(1) (1889) 43 Ch. D. 281.
(2) [1893] 3 Ch. 1.
(3) [1902] 1 Ch. 918.
(4) [1904] 2 Ch. 685.
(5) [1907] 1 Ch. 180.
(6) (1875) L. R. 19 Eq. 286.
(7) [1912] 1 Ch. 693.
(8) (1880) 16 Ch. D. 44.
(9) (1801) 6 Ves. 239.
(10) (1737) 1 Atk. 500.
(11) [1918] W. N. 36.
(12) (1742) 2 Atk. 473.
(13) [1896] 2 Ch. 711.

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SARGANT J. (after stating the facts). During the period between the testatrix's death and the marriage of Mr. and Mrs. Lazarus there were accumulations of income in respect of the settled legacy amounting to about 305*l.*, and those accumulations are now claimed by Mrs. Lazarus as belonging to her. I feel no difficulty with regard to her claim to them. Under no circumstances is she, in my judgment, entitled to them. If there is any hiatus in the disposition of them under clause 3 of the will, they are disposed of by the gift of the residuary estate. But I think that, on the true construction of clause 3, those accumulations follow the destination of the capital of the settled legacy. In my opinion, the words "the said trust premises," the income of which is directed to be paid to Mrs. Lazarus, include the accumulations of income which according to the ordinary rule would be accessory to the principal fund. In my judgment, therefore, the accumulations in respect of the settled legacy form part of the capital of that legacy.

I have next to deal with the claim on the part of Mrs. Lazarus to the accumulations of income of the residuary estate during the same period, which amount to a sum of about 527*l.* After the testatrix's death the trustees applied some of the income of the residuary estate toward the maintenance of the granddaughter Frances until her marriage with Mr. Lazarus, and in the meantime they accumulated the surplus income which they did not require for that purpose, and it is those accumulations of surplus income which Mrs. Lazarus is also claiming. It is not easy for me to state precisely how her claim to those accumulations is put. On the express terms of the will she is only entitled to so much of the income as the trustees thought fit in their discretion to apply for her benefit. But it has been argued that the trust to apply all or any part of the income for her maintenance or benefit is in substance a gift to her of the whole income. There are many cases, so it was said in argument, where such a trust to apply the whole or any part of the income has been held sufficient to effect an immediate vesting of the legacy and to entitle the legatee to the accumulated income notwithstanding the gift of the capital

fund was expressed to be subject to a contingency. And it was said that such a trust for the application of the income in the meantime could only have that effect on the footing that such a trust amounted in substance to a gift of the whole income to the legatee.

In my judgment that argument is not sound. I think that principle is applicable to a different class of case from the present. Such cases as for instance *Fox* v. *Fox* (1) establish that, where there exists an ambiguity in the frame of the bequest, as to whether the legacy is intended to vest immediately or on a contingency, the question of construction may be settled by a direction in the will to apply the whole or any part of the income in the meantime for the benefit of the legatee. That is a mere rule in aid of construction as to vesting of capital. *In re Williams* (2) is a case of the same kind, and I think that the reasoning in that case, so far from assisting the argument in favour of Mrs. Lazarus' claim, is rather against it. Neville J. there deals with three cases; first, where the intermediate income is given out and out; secondly, where the whole income is given for maintenance; and thirdly, where the whole or such part as the trustees think fit is given for maintenance. In each of those cases the effect of the trust relating to the intermediate income would effect an immediate vesting of the capital of the legacy, and the learned judge recognises that the vesting of the capital might ultimately carry with it the right to the intermediate income. But this is a very different thing from holding that the gift of a right to be maintained out of the whole or any part of the income would by itself vest the whole of the income.

In re Humphreys (3) turned on this, that there was an immediate vested life interest; the whole income was given to the beneficiary, and what was not required for her maintenance during her minority did not cease to be hers. But the decision, that the discretionary power given by the Conveyancing and Law of Property Act, 1881, to apply any part of the income in maintenance did not take away the vested right of the infant

(1) L. R. 19 Eq. 286. (2) [1907] 1 Ch. 180.
(3) [1893] 3 Ch. 1.

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in the surplus of the income, obviously does not involve the consequence, that a mere discretionary power given in the first instance to apply income in maintenance has the effect of actually vesting the whole or the surplus of the income.

Here there is nothing but a trust to apply so much of the income as the trustees thought fit until Mrs. Lazarus attained 21. The subsequent trusts exhaust all three alternatives, of attaining 21 before marriage, of marrying, and of death. Everything after the original trust of the income is contingent. The interest given to the legatee while a spinster and under 21 is not an interest in the whole income whether applied or not. In my judgment, the sum of 527*l.*, representing the accumulations of the unapplied income of the residuary estate, became on the marriage of Mrs. Lazarus part of the capital of the residuary estate and subject to the trusts declared by the will concerning the same.

Solicitors: *Lewis & Lewis; Lazarus & Son; Woodroffes & Ashby.*

F. E.

In re WRIGHT AND THOMPSON'S CONTRACT.

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Oct. 22, 23.

[1919. W. 246.]

Vendor and Purchaser—Abstract—Costs of Verification—Sale by Mortgagees —Possession before August, 1914—Fact stated in Answers to Requisitions—Statutory Declaration by Vendor—Conveyancing Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 3, *sub-s.* 6—*Courts (Emergency Powers) Act,* 1914 (4 & 5 *Geo.* 5, *c.* 78), *s.* 1.

Where the vendors' title to sell depends on a fact (e.g., that they became mortgagees in possession before the Courts (Emergency Powers) Act, 1914), and that fact though omitted in the abstract is stated in the answers to requisitions, the abstract is rendered complete and the expense of a statutory declaration made by a vendor or any other person in proof of the fact must be borne by the purchaser under s. 3, sub-s. 6, of the Conveyancing Act, 1881.

In re Conlon and Faulkener's Contract [1916] Current Digest 500; [1916] 1 I. R. 241 followed.

In re Moody and Yates' Contract (1885) 30 Ch. D. 344 distinguished.

VENDOR AND PURCHASER SUMMONS.

On December 23, 1918, the vendors sold certain houses by auction to the purchaser for 575*l.* The conditions of sale provided that the title should commence with an indenture of December 15, 1877, made between Taylor and Jackson, and condition 11 provided that "The vendors are selling as mortgagees under their power of sale and will only convey as such."

The abstract set out a mortgage of December 15, 1877, from Taylor to Jackson with the usual power of sale and clause protecting the purchaser and a transfer of October 5, 1912, from Jackson's executors to the vendors.

In his requisitions the purchaser required the vendors to comply (inter alia) with the Courts (Emergency Powers) Act, 1914, which provides by s. 1 that after the passing of the Act on August 31, 1914, no person shall enter into possession of any property or realize any security "except by way of sale by a mortgagee in possession" without an application to the Court. He stated that at the sale the vendors had arranged to comply with the Act.

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The vendors replied that as they were mortgagees in possession before the Act, it did not apply, and that they had so stated at the auction.

The purchaser pressed the requisition, and the vendors replied that they were mortgagees in possession before August, 1914, so that the Act was inapplicable.

The fact that the vendors became mortgagees in possession before the Act was not stated in the abstract.

Subsequently on February 8, 1919, the vendors wrote stating that their counsel had advised that they had submitted a perfectly good title; that their statement that they were mortgagees in possession before August, 1914, was quite sufficient; but that if desired a statutory declaration confirming that statement could be made by one of the vendors at the purchaser's expense.

The purchaser did not accept this offer, and on February 14, 1919, he issued this summons to determine this and other points.

G. E. Tyrrell for the purchaser. The purchaser is entitled to proof of all facts necessary to prove the vendors' title: Dart on Vendors and Purchasers, 7th ed., p. 366. He is clearly entitled to proof that the vendors were mortgagees in possession before August, 1914, and the only question is whether the cost of the proposed declaration is thrown on him by s. 3, sub-s. 6, of the Conveyancing Act, 1881.

That sub-section merely provides (inter alia) that "the expenses of searching for, procuring, making, verifying, and producing all certificates, declarations, evidences, and information not in the vendor's possession . . . . required by a purchaser, either for verification of the abstract, or for any other purpose, shall be borne by the purchaser who requires the same." It postulates the previous delivery of a proper abstract, and only deals with the expenses of requisitions made on the footing of such an abstract: *In re Johnson and Tustin.* (1) In the present case the fact as to the mortgagees' possession was not stated in the abstract.

(1) (1885) 30 Ch. D. 42, 46.

[ASTBURY J. It was stated before your summons both in the answers to requisitions and in the letter of February 8, and there is some evidence that it was stated at the auction.]

The purchaser did not so understand the statement at the auction. In any case a fact on which the vendors' power to sell entirely depends ought to have been stated in the abstract.

Secondly. Even assuming that the answers to requisitions and the letter of February 8 can be treated as part of the abstract, surely sub-s. 6 cannot apply to a declaration made by a vendor as to information wholly within his possession.

Thirdly. The declaration is an essential part of the vendors' title and sub-s. 6 is therefore inapplicable: *In re Moody and Yates' Contract.* (1)

J. W. Manning for the vendors. The fact as to our possession, even if not clearly stated at the auction, was stated in our answers to requisitions and our letter, and the abstract was complete before the summons was issued. The purchaser must bear the expense of verifying that fact by statutory declaration, just as he must bear the expense of verifying any other fact stated in the abstract —e.g., the vendors' heirship: *In re Conlon and Faulkener's Contract.* (2)

Secondly. The information is no doubt in the vendors' possession. But the evidence—namely, the statutory declaration—is non-existent. The purchaser must bear the expense of making it, whether it is made by a vendor or an outside declarant: *In re Conlon and Faulkener's Contract.* (3)

Thirdly. In *In re Moody and Yates' Contract* (1) the lessors' surveyor's certificate had never been made. It was an essential part of the vendor's title, which, without it, was liable to forfeiture. In the present case the declaration is mere evidence of an essential fact of the vendor's title. But it is not part of that title. The fact exists quite apart from the declaration: *In re Conlon and Faulkener's Contract.* (4)

Tyrrell in reply. In *In re Conlon and Faulkener's Contract* (4) the abstract was perfect, and non constat that the information

(1) 28 Ch. D. 661; 30 Ch. D. 344.

(2) [1916] Current Digest, 500; [1916] 1 I. R. 241.

(3) [1916] 1 I. R. 246.

(4) [1916] Current Digest, 500 [1916] 1 I. R. 241, 246.

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as to heirship was in the vendor's possession. The declaration was to be made by a competently informed person.

ASTBURY J. (after stating the facts). There is now no question that the vendors became mortgagees in possession before August, 1914, and have continued in possession ever since. No question arises as to the sufficiency of the proposed statutory declaration to prove that fact. The only question is, who is to pay for it.

Now s. 3, sub-s. 6, of the Conveyancing Act, 1881, provides (inter alia) that "the expenses of . . . . making . . . . declarations . . . . not in the vendor's possession . . . . required by a purchaser, either for verification of the abstract, or for any other purpose, shall be borne by the purchaser who requires the same." The result is that where a vendor's title depends on the existence of a fact, and that fact is stated in the abstract, the abstract is complete, and proof of the fact is verification within the section, the expense of which must be borne by the purchaser.

In *In re Moody and Yates' Contract* (1) the house sold was held under a building lease which required it to be finished to the satisfaction of the lessors' surveyor. The surveyor's certificate had never been made. Chitty J. held that it must be obtained at the vendors' expense as without it they had no title. It was not evidence of title, but part of the title itself. In the Court of Appeal (2) Brett M.R. said (3), "The covenant . . . . means his expressed satisfaction. That being so, it was necessary that the vendors should state that the expressed satisfaction of the surveyor had been obtained. But it is not stated, and therefore I think that the vendors' title was bad. . . . . The expression of the satisfaction of the surveyor is part of the title; an outward expression is substantially the only mode in which it can be shewn that the satisfaction of the surveyor really exists; it is part of, and not merely evidence of, the title itself, and therefore the certificate . . . . does not fall within sub-s. 6, which refers only to certificates being evidence of

(1) 28 Ch. D. 661. (2) 30 Ch. D. 344.
(3) 30 Ch. D. 347.

title, and not to certificates being part of the title itself." Fry L.J. said (1): "The approval of the lessors' surveyor is not merely a matter of evidence; the expression of the approval and the evidence of that expression are required, and this certificate is both. The certificate . . . . is not like a certificate of a pre-existing fact, such as a birth, a marriage, or a death; but it is the fact itself, and forms part of the vendors' title, which must be procured at their expense."

The above case was explained and distinguished in *In re Conlon and Faulkener's Contract* (2), an Irish case very similar to the present. The vendor's title depended on the fact of his being heir at law of a deceased owner. The fact of his heirship was stated in the abstract. It was held that the abstract was complete and proof of his heirship by statutory declaration or otherwise was merely verification of a fact stated on the face of the abstract, the expense of which must be borne by the purchaser. O'Connor M.R. said: "The document which is required is a declaration not in existence at the present moment; it requires to be made; and it is required merely for the purpose of verifying a fact which is stated on the face of the abstract. It seems to me that this case comes within the very words of the sub-section. The declaration asked for is not required for the purpose of adding to the abstract of title, or completing it, and this fact, in my opinion, distinguishes the present case from *In re Moody and Yates' Contract.* (3)" He then explained the distinctions in detail.

In the present case the fact that the vendors became mortgagees in possession before August, 1914, is not stated on the face of the abstract, but I have little doubt that it was stated at the auction, and at all events it is quite plain that before the summons was issued it was stated both in the answers to requisitions and in the letter of February 8. The abstract was thus supplemented by the statement of this necessary fact, which took the case outside the Act. The vendors had merely to show their title as mortgagees with a power of sale, and state that they were in possession before the Act. They showed their

(1) 30 Ch. D. 349.
(2) [1916] Current Digest, 500; [1916] 1 I. R. 241, 244.
(3) 28 Ch. D. 661; 30 Ch. D. 344.

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title and stated that fact. The expense of verification must be borne by the purchaser.

The purchaser relied on *In re Johnson and Tustin* (1), which decides that s. 3, sub-s. 6, does not interfere with the vendor's duty to produce a proper abstract. But in the present case the vendors in fact produced a proper abstract before the summons was issued, and the expenses of verification must therefore be borne by the purchaser.

Solicitors: *Ward, Bowie & Co., for C. T. Stockdale, Sunderland; Blair & W. B. Girling, for Huntly, Foster & Russell, Sunderland.*

G. R. A.

EVE J. 1919 *July* 24, 29.

In re MORGAN.

MORGAN *v.* MORGAN.

[1919. M. 1044.]

Will—Construction—Residuary Estate—"Statutes of Distribution"—Next of Kin—Intestates' Estates Act, 1890 (53 & 54 *Vict. c.* 39), *s.* 2—*Short Titles Act*, 1896 (59 & 60 *Vict. c.* 14).

The Intestates Estates Act, 1890, is not an Act proper to be included in the expression "Statutes of Distribution"; still less in the phrase used by a testator "statutes for the distribution of the personal estates of intestates":—

Held, therefore, that a claim by the widow of a testator under s. 2 of the Intestates Estates Act, 1890, for a further sum of 500*l.*, in addition to her share of the testator's residuary estate under the "Statutes of Distribution" failed.

Held, further, that the Intestates Estates Act, 1890, did not apply to a case where there was no intestacy, and the persons participating in the residuary estate of a testator took solely under the will, and not by virtue of the statutes.

ADJOURNED SUMMONS.

In his will dated July 25, 1912, the testator George Morgan appointed the plaintiffs his executors and trustees, and

(1) 30 Ch. D. 42.

after making certain specific and pecuniary bequests, devised and bequeathed all the rest and residue of his estate and effects, whether real or personal, to his trustees upon trust to sell and convert the same, and after payment of debts and legacies, as to one-third of the net proceeds not exceeding 5000*l.* upon trust to invest and pay the income to his wife, the first defendant, Eva Virginie Rose Morgan, during her life, and as to one other one-third of such net proceeds not exceeding 5000*l.* upon trust to invest and pay the income to his mother, Susannah Morgan, during her life, and on the respective deaths of his wife and mother, the respective thirds of such net proceeds, or sums of 5000*l.* each, were to be held upon the trusts declared as to the remaining one-third; and by clause 11 of his will the testator directed that as to the remaining one-third of such net proceeds his trustees should hold the same upon trust for all or any of his children or child who being sons should attain 21, or being daughters attain that age or marry, as tenants in common; and the testator further directed by clause 12 that if he should not leave any children who should attain 21 or marry then his trustees should hold his residuary estate and effects upon trust to pay the income thereof to his mother during her life; and by clause 13 the testator directed that after such failure of children and his mother's death, his trustees should hold the net proceeds of his residuary estate, or the investments representing the same, in trust for the persons or person who would at the time of the failure or determination of all the prior trusts thereinbefore declared have been entitled to his personal estate "under the statutes for the distribution of the personal estates of intestates, if I had died at the time of such failure or determination, intestate," such persons if more than one to take the shares which they would have taken under the same statutes. The testator died on April 29, 1918, leaving no issue. His mother, Susannah Morgan, died on May 12, 1919. The defendants were two sisters of the testator, and the children of a deceased sister. The testator's mother was the only lineal ancestor, and besides the defendants there were no brothers or sisters or children

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of brothers or sisters living at the mother's death. By an originating summons the trustees asked what the share of the widow was in the residue of the testator's estate, and a further question was added as to whether or no she was entitled to an additional 500*l.* under the provisions of the Intestates Estates Act, 1890.

Upon the first point Eve J. held that on the true construction of the will and in the events which had happened, the class of persons entitled to the residuary estate must be ascertained at the date of the death of the testator's mother. The further question as to the application of the Intestates Estates Act, 1890, was then argued.

J. H. Stamp for the trustees.

Clayton K.C. and *W. M. Hunt* for the widow. The widow is entitled to a charge for 500*l.* out of the whole estate under s. 2 of the Intestates Estates Act, 1890. That Act is one of the " statutes for the distribution of the personal estate of an intestate " within the meaning of this will. There is no partial intestacy here. The residuary estate is to be administered as if the testator had died intestate. *In re Cuffe* (1) applies.

J. M. Stone for the children of a deceased sister. It is a question of the construction of the phrase in the testator's will. The Intestates Estates Act, 1890, does not come within the expression " statutes for the distribution of the personal estates of intestates." The only statutes included in that term are those of 22 & 23 Car. 2, c. 10, and 1 Jac. 2, c. 17. The Intestates Estates Act, 1890, deals with real as well as personal estate, and was intended to apply only where a testator had died wholly intestate. It does not apply to a partial intestacy like the Act of Charles II., which is defined as the Statute of Distribution. This case comes within *In re Twigg's Estate.* (2) He also referred to *In re Nightingale.* (3)

S. C. N. Goodman for the sisters of the testator.

Clayton K.C. in reply.

(1) [1908] 2 Ch. 500. (2) [1892] 1 Ch. 579.
(3) [1909] 1 Ch. 385.

EVE J. It is not disputed that under s. 3 of the statute of Charles II. (22 & 23 Car. 2, c. 10) the widow is entitled to one moiety of the estate; the question is whether she is also entitled under the Intestates Estates Act, 1890 (53 & 54 Vict. c. 29), to the additional sum of 500*l.*

It is contended that she is not so entitled for two reasons—the one that this last-mentioned Act is not one of "the statutes for the distribution of the personal estate of intestates" referred to in clause 13 of her husband's will, and the other, that it has no application to this case because the husband did not die intestate.

By the Short Titles Act, 1896 (59 & 60 Vict. c. 14), the Act of Charles II. may be cited as "The Statute of Distribution." There is, however, no statutory guide to the meaning to be affixed to the collective title "The Statutes of Distribution," but for over two centuries the only two statutes to which the description "the Statutes of Distribution" could properly be affixed were the Act of Charles II. and the continuing and amending Act of James II. (1 Jac. 2, c. 17). In these circumstances I think that long before 1890 the expression had acquired an exclusive application which ought only to be extended to a fresh statute if the intention so to extend it is manifested in such fresh statute, either by express enactment or by necessary implication from its legislative effect.

No doubt the Intestates Estates Act, 1890, does make a change in the distribution of the property of intestates, but it is to be observed that it does not apply to all intestates but only to those who die leaving a widow but no issue, and further that the better provision thereby made for the surviving widow of such an intestate is payable out of his real and personal property rateably in proportion to their respective values.

In my opinion it is not an Act proper to be included in the expression "Statutes of Distribution," and still less in the phrase used by the testator, "statutes for the distribution of the personal estate of intestates."

Further, I am of opinion that the Act has no application to this case. The late George Morgan whose will I am

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construing did not die intestate. On the contrary, he died wholly testate, and although the persons who will participate in his residuary estate are to be ascertained and their interests determined by reference to the statutes applicable to an intestacy, they do not in any sense take by virtue of those statutes, but solely under the will.

For these reasons I think that the claim of the widow to the extra 500*l.* fails.

Solicitors : *Brash Wheeler, Chambers & Co. ; Clarke & Co. ; Tatton, Gaskell & Tatton ; Marchant, Newington & Tipper.*

G. M.

Referred to. KAIN *v.* NORFOLK. [1949] 1 Ch. 163

HAMMOND *v.* PRENTICE BROTHERS, LIMITED.

EVE J.
1919
Nov. 13, 14, 17, 26.

[1918. H. 1542.]

Easement—Right of Way—Grant—Construction—Bridge Tolls—Exemption—Licensees—Company—Registration—Certificate of Incorporation—Conclusiveness—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 18, 180, 191, 192, 193—*Companies* (*Consolidation*) *Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 17.

Where a company or partnership had been formed in April, 1889, by twelve persons with the primary object of acquiring and carrying on a particular partnership business, and had been registered in the same month under Part VII. of the Companies Act, 1862, and a certificate given by the registrar under s. 192 of that Act, stating that the company was incorporated as a limited company under the Companies Acts:—

Held, that such certificate was conclusive evidence that it was a company authorized to be registered under Part VII. even if the company had been formed for the mere purpose of being so registered. *Reg.* v. *Registrar of Joint Stock Companies. Ex parte Johnston* [1891] 2 Q. B. 598, 611, 613, discussed.

A grant of a right of way "to the grantees, their heirs and assigns, and their servants, customers, and workmen, and the tenants and occupiers" of the dominant tenement, for all purposes to pass along a road and over a bridge, toll free, extends to licensees of the grantees, and is not limited to the classes of persons specifically mentioned. *Mitcalfe* v. *Westaway* (1864) 34 L. J. (C. P.) 113 followed.

Where a grant of a right of way is in general terms and various other words are added to the usual words of limitation, in the absence of any special circumstances pointing in an opposite direction, the proper inference is that the added words are not intended to be read as exhaustive, but rather as illustrative of the classes of individuals entitled to use the way; and such a grant, being appurtenant to the dominant tenement, ought to be so construed as to secure to the grantee all that is necessary for the reasonable enjoyment of the dominant tenement. *Baxendale* v. *North Lambeth Liberal and Radical Club* [1902] 2 Ch. 427 followed.

WITNESS ACTION.

The plaintiff, William Hammond, was the owner of a suspension bridge over the river Bure separating Great Yarmouth from Runham Vauxhall in the county of Norfolk, and of the right to collect tolls in respect thereof. The first defendants were chemical manure manufacturers and claimed to be the owners in fee simple of chemical manure works at Runham Vauxhall.

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The other defendant, William Utting, was a general carter and contractor carrying on business on his own account in Great Yarmouth.

The plaintiff's title to the bridge and tolls commenced with an Act of Parliament of 1827 (7 & 8 Geo. 4, c. xxxi.), which was an Act for erecting a bridge over the river Bure from Runham to Great Yarmouth, and which, after reciting to the effect that Robert Cory was then entitled to certain lands and hereditaments in the parish of Runham, on the west side of the river Bure which separated the Ferry farm from the parish of Great Yarmouth, and to a right of ferry and tolls for horses, carts, carriages, cattle, and passengers over the river Bure at the Ferry farm from and to Great Yarmouth, and that it would be of public advantage if a bridge was erected across the Bure in lieu of the ferry, empowered Robert Cory, his heirs and assigns, at his or their own costs, to erect and maintain a bridge, and prescribed the tolls to be taken by Robert Cory, or the owner or owners, proprietor or proprietors for the time being of the said bridge, for all passengers, beasts, cattle or carriages passing over the same, and vested the said tolls in the said Robert Cory, his heirs and assigns, and provision was thereby made for erecting toll gates and enforcing payment of the tolls. The Act provided, among other things, that the bridge should be a public bridge on payment of the said tolls, that penalties should be imposed for non-payment of tolls, and that the Act should be deemed and taken to be a public Act.

After the passing of this Bridge Act Robert Cory erected a suspension bridge which was opened for public use and still existed. Robert Cory died in 1840, having by his will devised his real estate to Isaac Preston Cory and Alexander Turner Cory in trust for his children as therein mentioned, and gave his trustees a power of sale over his real estate. I. P. Cory died in April, 1842.

By the Norfolk Railway Yarmouth Extension Act, 1847 (10 & 11 Vict. c. xcix.), after reciting the Bridge Act and that it had been agreed between the railway company and A. T. Cory (the surviving trustee of R. Cory), the owner of the bridge,

that all passengers, cattle, carts, etc., passing over the bridge to and from the station of the railway company should be exempted from toll, the said A. T. Cory was authorized to remove the existing toll gate at the N.-W. end of the bridge, and erect another as therein mentioned, and that such removal should not prejudice the right of A. T. Cory, or the owners of the time being of the bridge, to demand and take the tolls authorized by the Bridge Act; and it was further enacted that if any person or corporation should evade any toll granted by the Bridge Act, or if any person should claim exemption from tolls when such exemption should not exist, every person or corporation so offending should be liable to penalties in the Railway Act mentioned, and the same should be recovered in an action for debt. The said right of ferry, the bridge, and all tolls, rights, and privileges so vested in Robert Cory his heirs or assigns by virtue of the Bridge Act and the Railway Act ultimately became vested in possession in the plaintiff, William Hammond, in fee simple by a deed of December 22, 1915. The premises so vested in the plaintiff comprised, among other hereditaments, the River Wall Road leading from the bridge to the premises of the defendant company. The defendant company was now in occupation of, and claimed to be owners in fee of three parcels of land near the bank of the river Burc, which lands formerly formed part of the Ferry farm, and two of those parcels were utilized for the site of the chemical works which were approached from the bridge by the River Wall Road.

As to (A), one of those parcels (being the land coloured green on an ordnance plan used at the trial), the defendants claimed that by a deed dated May 31, 1858, the trustee of R. Cory and other parties interested under his will conveyed the same to one Robert Yaxley in fee simple together with "full and free liberty and power to and for the said Robert Yaxley, his heirs and assigns, and his and their servants and workmen and the tenants and occupiers for the time being of the said pieces or parcels of land hereinbefore described, or any part or parts thereof, from time to time and at all times for ever hereafter, at his and their respective will and pleasure, by

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night and by day, and for all purposes, to go, return, pass, and repass to and from the parish of Great Yarmouth, with or without horses, carts, waggons, and other carriages, laden or unladen, and also to drive cattle and other beasts on through along and over" (certain roads, including the River Wall Road) "and also on, through, along, and over the Suspension Bridge over the River Bure to and from the said parish of Great Yarmouth, and the toll gate or toll gates thereof now across or hereafter to be placed across the said roads or ways, the right or liberty of passing over which is hereby granted toll free."

As to (B), the greater part of the defendant company's land (coloured pink on the said plan), it was by a deed dated September 30, 1869, conveyed by the trustees of R. Cory and the beneficiaries under his will to John Baly and Francis Sutton, analytical chemists, in fee simple, together with liberties and powers with respect to the use toll free of the said roads and bridge precisely similar to those contained in the deed of May 31, 1858, except that the additional word "customers" was therein inserted between the word "servants" and the words "and workmen."

For many years prior to April, 1889, the fee simple of these two parcels was vested in John Baly and Francis Sutton carrying on business in partnership as artificial and chemical manure manufacturers. On April 8, 1889, a company or partnership was constituted by articles of association between Messrs. Baly & Sutton and ten other persons with the primary object of acquiring and carrying on the business theretofore carried on by Messrs. Baly & Sutton, the capital being 20,000*l.* divided into 2000 transferable shares. Amongst the assets to be brought into the joint stock of the new partnership by Messrs. Baly & Sutton were the hereditaments now under consideration, and on April 20, 1889, Messrs. Baly & Sutton duly conveyed the same to themselves and their ten associates "as part of the joint stock of the company or partnership." This company was on April 26, 1889, registered under Part VII. of the Companies Act, 1862, and on the same day a certificate of incorporation was given by the Registrar

" that the Baly & Sutton Company (constituted by articles of association dated April 8, 1889) is this day incorporated under the Companies Acts, 1862 to 1886, and that the company is limited."

As to (C), the remaining part of the defendant company's land, which consisted of a small plot (coloured blue on the same plan), and separated from the chemical manure works, it was conveyed by a deed dated November 16, 1895, by one James Ryal to H. W. Hunter Butler in fee simple " together with full and free right and liberty to and for the said H. W. H. Butler his heirs and assigns, and his and their servants and workmen, and the tenants and occupiers for the time being " of the hereditaments thereby conveyed at all times for ever to go return pass and repass with or without horses, carts, and carriages, in through along and over the suspension bridge over the river Bure to and from the parish of Great Yarmouth, and over the said River Wall Road to and from the thereby conveyed hereditaments, the right of passing over which bridge and road to the thereby conveyed hereditaments but no further was thereby granted toll free. In the case of each of these three conveyances the conveying party was the then owner in fee simple of the River Wall Road and of the bridge and tolls and the other rights and privileges under the Acts of Parliament.

The first defendants alleged that they had now become owners in fee of the premises (A) and (B) by virtue of two deeds of April 20, 1889, and February 8, 1894; and of premises (C) by virtue of a deed of November 16, 1900. The plaintiff alleged that at the date of the first grant of May 31, 1858, the land now occupied by the defendant company was marsh land occupied and used for agricultural purposes only, and there had since been erected thereon a large factory wherein the defendant company carried on the business of chemical manure manufacturers and employed a large number of workmen. The defendant, William Utting, had for some years past carted goods and raw material for the defendant company to and fro from the lands and factory of the defendant company

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from and to Great Yarmouth over the plaintiff's bridge, and the defendant company claimed that they were entitled to employ the defendant Utting, and the defendant Utting claimed that he was entitled by virtue of the grants in the before-mentioned deeds relating to (A) and (B) to serve the first defendants free from any obligation to pay tolls over the road and bridge while carrying out such service on behalf of the first defendants. In August, 1918, the plaintiff summoned certain carters employed by the defendant Utting before the magistrates of Great Yarmouth to recover penalties for non-payment of tolls, but the magistrate refused to adjudicate until the validity of the claim had been established. The defendants having persisted in their claim the plaintiff brought his action claiming an injunction to restrain the defendant company from licensing or inviting W. Utting, his servants or workmen, to pass and to restrain W. Utting, his servants and workmen, from passing to and fro to the premises of the defendant company and along and over the plaintiff's bridge to and from the parish of Great Yarmouth without paying to the plaintiff the proper toll; an account; and damages.

By their defence the first defendants relied upon the three conveyances of property mentioned above containing the grants of a right of way. They alleged that goods and materials carried by the defendant Utting were necessarily required for the due and reasonable conduct of the business of the first defendants on the said premises, and the goods and materials so carried were exclusively the goods and materials of the first defendants and had been carried with the knowledge of the toll owner for the time being. They pleaded that no tolls had been in fact demanded from those passing along River Wall Road through the side road toll gate for many years past until 1918, and that the right to demand tolls had been abandoned; and the plaintiff was equitably estopped from claiming them. The Statute of Limitations was also pleaded.

There was evidence that the toll gate on the Great Yarmouth side of the suspension bridge had been moved to the other side

of the river, and one toll gate had been placed at the side road leading along the river to the defendants' chemical works, and another at Acle New Road beyond the turning to Vauxhall railway station, there being some 60 yards between the two toll gates, and that no tolls had been in fact collected at the side road toll gate for upwards of forty years prior to the plaintiff's possession. There were instances of composition payments having been made by the Ecclesiastical Commissioners and the Yarmouth Corporation exempting their tenants and employees from tolls.

Courthope Wilson K.C. and *Baden Fuller* for the plaintiff, after tracing the plaintiff's title to the bridge and tolls from the Bridge Act of 1827 to the conveyance to him of December 22, 1915, submitted that the burden of proof lay upon the defendants to prove their title to use the bridge and road without payment of tolls.

Maughan K.C. and *Ashworth James* for the defendants. The defendant company claim exemption from tolls by virtue of the grants to their predecessors in title in the three deeds of May 31, 1858, September 30, 1869, and November 16, 1895. The grant in the main document, which is the deed of September 30, 1869, to Baly & Sutton, "their heirs and assigns, and their servants, customers, and workmen, and the tenants and occupiers" of the dominant tenement is wide enough to include all persons who lawfully use the premises of the defendants, such as guests, contractors, servants, or licensees. The Courts will construe a grant of this nature against the grantor. It is an easement appurtenant to the land conveyed. Such a grant as this will include a licensee from the grantees. *Mitcalfe* v. *Westaway* (1) and *Baxendale* v. *North Lambeth Liberal and Radical Club* (2) cover the present case. In the older precedents of grants of rights of way the words "heirs and assigns" alone were used, but later on various additional words came to be inserted such as agents, workmen, etc.; but these may really be regarded as surplusage. If not, in the present case visitors, children,

(1) 34 L. J. (C. P.) 113. (2) [1902] 2 Ch. 427.

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and tradesmen would all be excluded from coming to the dominant tenement without paying toll. There has been also neglect for forty years to demand and collect tolls by the side road toll gate from those using the bridge. That amounts to an abandonment of the toll by the plaintiff's predecessors. They have put their own construction upon the grant, and treated the defendants and others as entitled to use the bridge and road. The first defendants have therefore acquired a prescriptive right for their licensees to use the bridge and road.

Courthope Wilson K.C. and *Baden Fuller* for the plaintiff. The defendant company have not made out their title to (A) and (B) by the conveyance of April 20, 1889. The articles of association constituting Baly, Sutton and ten others a company or partnership were entered into on April 8, 1889. Our submission is that Baly, Sutton & Co. were not properly registered as a limited company under Part VII. of the Companies Act, 1862, and could not have been; consequently s. 193 of the Act does not apply. The certificate of incorporation cannot be treated as conclusive in a case where a company has been formed for the sole purpose of being registered under Part VII.: *Reg.* v. *Registrar of Joint Stock Companies. Ex parte Johnston.* (1) The inference here is that that was the only object for which the company was formed, and therefore the registration was a nullity, and the hereditaments conveyed were never vested in the incorporated company, but remained in the twelve persons named in the deed of April 20, 1889. There are cases where a certificate of incorporation may be held conclusive, as in *In re George Newman & Co.* (2) Now, by virtue of s. 17 of the Act of 1908, the certificate is absolutely conclusive. Other cases on this point prior to 1908 are *In re National Debenture and Assets Corporation* (3) and *In re Laxon & Co.* (4) On the second point as to the true construction of the grant of the easement, it is a carefully defined grant and its express limits are mentioned. "Licensees" do not come

(1) [1891] 2 Q. B. 598.
(2) [1895] 1 Ch. 674, 685.
(3) [1891] 2 Ch. 505.
(4) [1892] 3 Ch. 555.

within the term " assigns " : *Brookman* v. *Smith* (1) ; *Milman* v. *Lane.* (2) *Mitcalfe* v. *Westaway* (3) is distinguishable as the right of free access was given to those having an interest in the land and the defendant there was a trespasser on the land. The defendant Utting does not come under the term " servant " or " workman." *Baxendale* v. *North Lambeth Liberal and Radical Club* (4), goes beyond the law as previously laid down, but the grant there was in extremely wide terms. It is an authority for saying that the express words used in the grant are to be construed. *Cannon* v. *Villars* (5) was a case of a grant of right of ingress and egress to a dwelling house, and that was held to be a general and not a restricted grant of a right of way to be used for the reasonable purposes of the plaintiff's business. Here it is a question of passage to freehold land, and the persons to use it are restricted. It is a question of the nature of the road and the purpose for which the grant was originally made.

This grant of the right of way must also be construed with regard to the exemption from tolls, and as a whole. The release from the statutory obligation to pay tolls was the main purpose of the grant and the right of way was merely ancillary to it. The only approach to the dominant tenement from the bridge at the date of the grant in 1869 was by the River Wall Road, so there would have been a way of necessity along it to the defendants' premises, and the right to use it would have passed as incident to the grant of the land. No extensive grant of right of way was therefore intended, and it must be construed in its limited and restricted sense. In *Keith* v. *Twentieth Century Club* (6) the *Baxendale Case* (4) was cited and ignored, and Buckley J., after discussing in turn the persons named in the grant as entitled to use a garden held that licensees from those so held entitled were outside the grant. With regard to the defence of the Statute of Limitations, tolls are not within the statute at all : *Mellish* v. *Brooks.* (7) Nor can tolls established by an Act of Parliament

(1) (1871) L. R. 6 Ex. 291.
(2) [1901] 2 K. B. 745.
(3) 34 L. J. (C. P.) 113.
(4) [1902] 2 Ch. 427.
(5) (1878) 8 Ch. D. 415.
(6) (1904) 90 L. T. 775.
(7) (1840) 3 Beav. 22.

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be abandoned: that can only be effected by another Act of Parliament. In the present case there is only one toll, the Bridge toll, created by the Bridge Act of 1827, and it has never been abandoned. It cannot be lost by non-exercise of the right: Lord Halsbury's Laws of England, vol. xvi., p. 64. In *Deards* v. *Goldsmith* (1) it was held that an omission by trustees to demand tolls for forty years established no right in the public to exemption. No case of equitable estoppel arises in the absence of fraud. Nothing short of that will suffice: *Willmott* v. *Barber*. (2) The plaintiff is therefore entitled to a declaration establishing his rights, and for an account of the tolls from July, 1918, when his first demand for tolls was made.

Maughan K.C. in reply. There is no substance in the point as to the certificate of incorporation not being conclusive. If correct, it would invalidate the title of many breweries in the country. *In re George Newman & Co.* (3) establishes that the certificate is conclusive, and in any case it is so now by the Act of 1908. On the construction of the grant it must be construed with reference to the persons entitled to use it. Here it is not a grant of a private right of passing over a bridge. If there is any ambiguity in the terms of the grant, evidence of user is admissible: *Watcham* v. *Attorney-General of East Africa Protectorate* (4); *North Eastern Ry. Co.* v. *Lord Hastings* (5)

Cur. adv. vult.

Nov. 26. EVE J. The plaintiff is the owner of the suspension bridge over the river Bure connecting Great Yarmouth and Runham, and of the right to collect tolls for horses, vehicles, cattle and passengers crossing the bridge, and also of a road known as the River Wall Road, over which any vehicle or passenger crossing the bridge must pass in order to reach the defendant company's premises.

The defendant company is in occupation and claims to be the owner in fee of three parcels of land in Runham coloured

(1) (1879) 40 L. T. 328.
(2) (1880) 15 Ch. D. 96, 106.
(3) [1895] 1 Ch. 674.
(4) [1919] A. C. 533.
(5) [1900] A. C. 260.

green, pink and blue on the ordnance map used at the trial. The parcels coloured green and pink are used for carrying on the business of artificial and chemical manure manufacturers, that coloured blue as the site—shut off by fences from the works—of a dwelling house occupied by one of the company's workmen.

The defendant Utting is the owner of several carts and horses, and for many years past he has contracted to cart coal and raw materials to, and manufactured goods from the defendant company's premises. Such carting involves frequent passage along the River Wall Road and across the bridge.

In this action the plaintiff seeks to have it established that the defendant company has no right or power to license or invite Utting or his servants to pass, and that Utting and his servants are not entitled to pass to and from the defendant company's premises over the plaintiff's bridge without paying the proper toll for so doing.

By way of answer to the plaintiff's claim the defendants rely on grants by a predecessor of the plaintiff to predecessors of the defendant company in the ownership of the parcels coloured green and pink of a full right of way for all purposes along and over the River Wall Road and along and over the bridge free of toll.

Before examining these grants and considering the construction to be placed upon them I will deal with the argument impeaching the defendant company's freehold title to the two parcels I have just referred to. I do not think the point is of much importance in this case inasmuch as the rights and liberties on which the defendants rely are exercisable, amongst others, by the occupiers for the time being of the said parcels, and that the defendant company is in occupation is not denied. Still it is as freeholder that the company is resisting the plaintiff's claim, and as the alleged defect in the freehold title has been made the subject of an elaborate argument on both sides it is as well that I should express my opinion upon it. It is of this nature. [His Lordship stated the facts as to the formation of the company of Baly, Sutton & Co., and

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continued :] It is contended on behalf of the plaintiff on the strength of some observations contained in the judgment of the Court of Appeal in the case of *Reg.* v. *Registrar of Joint Stock Companies* (1), that even if the partnership created by the articles of April 8 was a company duly constituted by law within s. 180 of the Act of 1862, it was not capable of being registered under Part VII. of that Act, and from this it is said to follow that the attempted registration was a nullity, that the hereditaments intended to be vested in the incorporated company were never so vested, but remain to this day outstanding in the twelve individuals named in the deed of April 20, 1889, and consequently that the defendant company acquired no title thereto by the conveyance to it executed by Baly, Sutton & Co., Ld., and its mortgagees on February 8, 1894. It is not suggested that this conclusion is warranted by anything that was actually decided in the case cited, but reliance is placed on the concluding sentences of the judgments of Lindley and Fry L.JJ. respectively. I need not read the passages in extenso—their purport is adequately indicated in Lindley L.J.'s concluding observation : "It appears to me to be a misconstruction of the Act of Parliament, and a misuse of it, to form any company, I do not care what it is, simply for the purpose of registration under Part VII." ; and in Fry L.J.'s statement of his view, that if seven or more persons associated for any lawful purpose desire to form an incorporated company under the Act they must do it in the method prescribed in Part I. of the Act, and "cannot lawfully in any other way enter into a combination or association or company for the mere purpose of obtaining incorporation as a company under the Act."

The only evidence here that Baly, Sutton & Co. was formed for the mere purpose of registration is such as is to be deduced from the rapid sequence of events in April, 1889, and the contents of the documents of the 8th and 20th of that month. It may be that these are sufficient to warrant the inference sought to be drawn, but it is not necessary to express a concluded opinion upon the point. The truth is that the

(1) [1891] 2 Q. B. 598, 611, 613.

language of the Lords Justices must be read in the light of the case they had to deal with—a case in which they had to adjudicate on an application for a mandamus to compel the registration of that particular partnership as a company under Part VII.; their minds were not directed towards, nor could it have been in any way relevant in that case to have invited them to consider, still less to determine, the position and status of a partnership formed, it may be, with the object or, if you will, for the mere purpose of registration, and actually registered under Part VII. The plaintiff here is inviting me to hold that the logical conclusion to be drawn from the opinions there expressed is that the registration of all such partnerships or associations is void, and of no effect with this deplorable result, that scores of important industrial and trading concerns which have for years past been carrying on business as companies incorporated with limited liability have never in fact been so incorporated but have remained throughout partnerships with unlimited liability and became illegal so soon as their members exceeded twenty in number. I think I should be doing wholly wrong were I to impute to the language of the Lords Justices any such far-reaching consequences. In my opinion the certificate of incorporation given to this company under s. 192 of the Act of 1862 is conclusive evidence that the company was authorized to be registered under Part VII., and although it may be that if prior to the substitution of s. 1 of the Act of 1900 for ss. 18 and 192 of the Act of 1862, now in turn replaced by s. 17 of the Act of 1908, it could have been established that at the date of the registration no partnership or association capable of registration was really in existence, the conclusiveness of the certificate, by analogy to the decision in the case of *In re National Debenture and Assets Corporation* (1), might have been challenged—a point on which I entertain the gravest doubt, having regard to the very different wording of ss. 18 and 192 of the Act of 1862—I am satisfied that it is not now open to the plaintiff to go behind the certificate in this case, and that the Court of Appeal never intended the observations relied upon

(1) [1891] 2 Ch. 505.

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to apply, even as the statute law then stood, to a company then already registered under Part VII. and possessed of the evidence declared by statute to be conclusive of the fact that it was a company authorized so to be registered. I think the judgment of Lindley L.J. in *In re George Newman & Co.* (1), a company registered under Part VII., and in particular the passage on page 685, where he refers to s. 192, and adds: "The Court is bound to recognise the company as incorporated, and to give effect to all the consequences of such incorporation" is inconsistent with the suggestion that his language in the earlier case is capable of the interpretation sought to be put upon it by the plaintiff.

The defendant company has therefore, in my opinion, proved a freehold title to the green and pink land and the easements granted therewith. This brings me to the question, What is the construction of the grants? As both are, for practical purposes, in identical terms I will confine myself to that dealing with the easements granted with the pink parcel. It is a grant to the grantees, their heirs and assigns, and their servants, customers and workmen, and the tenants and occupiers of the dominant tenement, or any part thereof, of full and free liberty and power from time to time and at all times for ever thereafter at their respective will and pleasure by night and by day and for all purposes to go, return, pass and repass to and from Great Yarmouth with or without horses, carts, waggons and other carriages laden or unladen and also to drive cattle and other beasts in, through, along and over—amongst other roads—the River Wall Road and also on, through, along and over the suspension bridge to and from Great Yarmouth and the toll gate or toll gates thereof then across or thereafter to be placed across the said roads, the right or liberty of passing over which was thereby granted toll free.

The question is, Does that grant extend to licensees of the grantees or is it limited to the classes of persons specifically mentioned?

(1) [1895] 1 Ch. 674, 685.

No oral evidence was given as to the condition of the dominant tenements at the date of the grant in 1869 or the use to which they were then being put, but the description of the grantees in the conveyance and the reference to "customers and workmen" indicate pretty clearly that a user for business purposes was at least in contemplation of the parties. On behalf of the plaintiff it was contended that inasmuch as the River Wall Road would appear to have been the only means of approach to the dominant tenements at the date of the grant—a point, however, upon which no evidence was produced—the right to use it would have passed without any special words as incident to the grant of the tenement, and this was relied upon in support of the argument that in this particular case the grant, for the purposes of construction, is to be treated not so much as a grant of a right of way as a release from a statutory obligation to pay toll. Indeed it was said that the grant of the right of way ought properly to be treated as merely ancillary to the release of the obligation. From this point of view it was contended that in this instance the grant ought to be restricted to the persons or classes of persons named in the deed. It may well be that the release of the tolls constituted the more valuable part of the grant, and in that sense represents the greater share of the burden imposed on the servient tenement, but I do not think it follows from this that I ought to approach the construction of the clause as though it were a release of tolls in favour of certain persons and a grant of a right of way to the same persons. It is not strictly that; it is a grant of a right of way from one terminus to another, with a release to those included in the grant of the right to exact toll from them for the use of a specified length of the passage. I think, therefore, it ought to be construed in the same manner as a grant of an ordinary right of way unencumbered by any question of tolls would be. In such a case does the addition of the words "servants, customers and workmen" so restrict the grant to the grantee, his heirs and assigns as to exclude licensees of the grantee from using the way for the purpose of approaching and leaving the dominant tenement? The

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question must, I think, be framed in this manner, as there is authority for saying that a grant to "A. B. his heirs and assigns" would include A. B.'s licensees (*Mitcalfe* v. *Westaway* (1)), and the added words must therefore either operate by way of restriction or be surplusage. A perusal of the precedents in the text-books discloses a great variety in the selection of the words added to the usual words of limitation, and it is not difficult to suggest instances in which many of these precedents fall short of giving the grantee all that is reasonably requisite for the enjoyment of the dominant tenement if the added words are to be construed as restrictive and definitive of the persons entitled to pass to and fro over the servient to the dominant tenement. Parties may, of course, so frame the grant as to demonstrate their intention that it is to be limited in its application to particular objects, but when the grant is in general terms, and there are no circumstances subsisting at the date of the grant and nothing in the grant itself sufficient to point in an opposite direction, I think the proper inference is that the added words are not intended to be read as exhaustive, but rather as illustrative of the individuals or classes of individuals entitled to use the way. In this case, unless I adopt this view, no visitor, no doctor, no tradesman, no traveller, and no apprentice can approach the defendant company's premises under this grant. After all the grant is appurtenant to the dominant tenement, and in my opinion in the absence of special circumstances ought to be so construed as to secure to the grantee all that is necessary for the reasonable enjoyment of the dominant tenement, and I think the case of *Baxendale* v. *North Lambeth Liberal and Radical Club* (2) is a sufficient authority for this proposition.

I hold, therefore, that the plaintiff is not entitled to the declaration he claims, and I dismiss the action with costs. Should the matter go to another Court it may perhaps be of assistance if I add that in my opinion no abandonment by the plaintiff of the right to collect toll was established nor was any case of estoppel made out against him. On the other

(1) 34 L. J. (C. P.) 113. (2) [1902] 2 Ch. 427.

hand the evidence proved that no demand for toll at Sidegate had been made for forty years before a very recent date from any person passing to or from the defendant company's premises, and there was no evidence that any toll had been demanded or paid at that gate by any person or persons prior to the plaintiff becoming owner of the tolls. The composition payments made by the Ecclesiastical Commissioners and the Corporation of Yarmouth were compositions paid for the use of the bridge, and exempted their tenants, agents and employees from toll at all the gates and had no special reference to Sidegate although no doubt the tenants, agents and employees have used that route as well as the one through the Acle Road Gate.

Solicitors: *Torr & Co., for Ferrier & Ferrier, Great Yarmouth; Tamplin, Tayler & Joseph, for Gudgeons, Peecock & Prentice, Stowmarket.*

G. M.

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[1919. D. 517.]

Workman—Combination of Employers—Rules—Protection of Trade Interests—Dispute between Employer and Employee—Procuring Dismissal of Employee—Motive—Coercion—Peaceful Persuasion—Restraint of Trade—Trade Union—Trade Union Act Amendment Act, 1876 (39 & 40 *Vict. c.* 22), *s.* 16—*Trade Union Act*, 1871 (34 & 35 *Vict. c.* 31), *s.* 4.

The rules of an Association comprising substantially all the retail dealers of yeast in a large area stated the object of the Association to be (*a*) to enable the members to meet from time to time for mutual counsel; (*b*) to advise the meeting of all defaulting customers; and (*c*) to improve the tone of the trade generally and create a more amicable feeling amongst the members; and (rule 20) "on an employee leaving an employer, who is a member of the Association, the employer shall (if so desirous) report the same to the secretary who shall advise all the members, and no other member of the Association shall employ or supply him for 12 months." The officials of the Association were W. (the secretary) and three other persons.

D., after serving two years with W. as his traveller to obtain orders for yeast from his customers in his district, which was within the area

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entered the service of H., also a member of the Association and carrying on business in the same district, subject to a month's notice on either side to be given at any time. W., finding that D. was obtaining from his customers orders for yeast for H., convened a meeting of the Association which H. attended. At this meeting the attention of H. was called to rule 20 and he was asked to dismiss D. which he refused to do. After the meeting further discussion took place between some of the members (including W.) and H., and eventually H. consented to give and did give H. notice determining his employment. In an action by D. against the officials of the Association claiming damages and an injunction to restrain them from interfering with him in his calling on the ground that they had used their position and influence as officials to bring undue pressure to bear on H. to procure his dismissal :—

Held, following *Mineral Water Bottle, Etc., Society* v. *Booth* (1887) 36 Ch. D. 465, that rule 20 was in unreasonable restraint of trade and void, but not on that account an offence at common law.

Held that rule 20 was framed with the sole object of benefiting the members of the Association in their respective businesses and not with the object of injuring employees who might be adversely affected thereby, and therefore did not amount to a criminal or actionable conspiracy.

Held therefore that D. had no cause of action, for that on the evidence he had failed to prove his dismissal was obtained by illegal means, i.e., coercion, intimidation, threats or undue influence.

The principle of *Allen* v. *Flood* [1898] A. C. 1 applied.

Quinn v. *Leathem* [1901] A. C. 495, and *Giblan* v. *National Amalgamated Labourers' Union* [1903] 2 K. B. 600 distinguished.

Semble, the Association was a trade union as defined by s. 16 of the Trade Union Act Amendment Act, 1876, and therefore came within the protection of s. 3 of the Trade Union Act, 1871.

WITNESS ACTION.

This was an action in which the plaintiff claimed an injunction to restrain the defendant from interfering with him in the exercise of his calling of a traveller in the yeast trade.

The following statement of facts is taken substantially from the judgment,

The plaintiff in the month of August, 1917, entered into the employment of the defendant Williams who was a wholesale and retail yeast dealer carrying on business in Swansea and having numerous branch establishments in other parts of West and Mid-Wales including a branch establishment in the town of Neath. The duties of the plaintiff were confined to the retail business in Neath and the surrounding district, and consisted in canvassing for customers, selling and delivering the yeast, and collecting and transmitting to his

employer the money payable by the customers for the yeast purchased by them. The remuneration of the plaintiff at the commencement of his employment was a salary of 2*l*. per week and a commission; this remuneration was subsequently increased from time to time. The plaintiff, who had not previously been engaged in the yeast trade, was introduced to all the customers of the defendant Williams in the district in which he was employed. The defendant Williams was the proprietor of certain registered brands of yeast, including the "Acme" and "Double Leek" brands. The brands handled by the plaintiff were confined to the "Acme" and "Double Leek" brands. On the plaintiff entering upon his employment the defendant Williams requested him to sign an agreement (a form of which he handed to him) not to carry on or be engaged in the business of a yeast merchant or in the sale of yeast in the town of Neath or within a radius of twelve miles therefrom for a period of two years from the termination of his engagement. The plaintiff on September 5, 1917, signed the form of agreement which had been so handed to him, but did not return it to the defendant Williams nor inform him of the fact that he had signed it. On a subsequent occasion the defendant Williams when inquiring after the agreement said that, whether the plaintiff signed it or not, no agent of his would have a chance of setting up in business, to which the plaintiff replied "Then there is no point in it," whereupon the matter dropped, and it is common ground that the plaintiff is not bound by any restrictive agreement. On January 11, 1919, the plaintiff, owing to differences which had arisen between him and the defendant Williams, gave a month's notice in writing to terminate his engagement expiring on February 8, 1919, which notice was accepted by the defendant Williams. On January 24, 1919, the defendant Williams (in a letter of that date) asked the plaintiff to stay on for another week beyond February 8, which the plaintiff agreed to do. In accordance with the notice and the arrangement thus come to, the plaintiff left the employment of the defendant Williams on Saturday, February 15, 1919, having first introduced his successor to the customers.

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The plaintiff then entered into the employment of Mr. Hopkins, a retail yeast merchant carrying on business in Neath. The plaintiff had discussed the terms of his new employment with Mr. Hopkins during the last week that he was in the employment of the defendant Williams but had not come to any definite agreement before leaving. On Saturday, February 15, 1919, the plaintiff after he had settled up his affairs with the defendant Williams went to Llansamlet where Mr. Hopkins resided and engaged himself to Mr. Hopkins. The terms of this new engagement were contained in a written agreement which was signed by the plaintiff and Mr. Hopkins on the evening of February 15, 1919. This agreement contained a provision that the engagement of the plaintiff could be terminated by either party by one calendar month's notice to be given on any date, and a further provision that the plaintiff should not for three years after the termination of his engagement carry on the business of a yeast dealer or act as a traveller, agent, assistant or clerk to a yeast dealer or be concerned or interested in any business of a similar kind within ten miles of the General Post Office at Neath.

Both the defendant Williams and Mr. Hopkins were members of an association known as the West and Mid-Wales Dealers' Association (hereafter referred to as the Association). The objects of the Association as defined by its rules were: "(*a*) to enable the members to meet from time to time for mutual counsel; (*b*) to advise members of all defaulters "(i.e., defaulting customers); "and (*c*) to improve the tone of the trade generally and create a more amicable feeling amongst the members." The area of the Association's operations comprised the counties of Pembroke, Carmarthen, Cardigan, Brecon, Radnor and Glamorgan as far east as Port Talbot, and practically every retail yeast dealer within this area was a member of the Association. The defendant Thomas was the chairman, the defendant Reynolds the vice-chairman, the defendant Rice the treasurer, and the defendant Williams the secretary of the Association. Rule 20 of the Association rules was as follows: "An employee leaving an employer

who is a member of the Association, the employer shall (if so desirous) report same to the secretary, who shall advise all the members, and no other member of the Association shall employ or supply him for twelve months." There was no rule providing for the expulsion of members, nor for imposing any penalty for an infraction of the rules.

On February 17, 1919 (the first day on which the plaintiff commenced to canvass for Mr. Hopkins), the defendant Williams saw the plaintiff walking in the streets of Neath, with a bag of yeast under his arm, and on making inquiries found that he had been canvassing his (the defendant Williams') customers on behalf of Mr. Hopkins. The defendant Williams thereupon, on February 22, 1919, wrote a letter to the plaintiff containing the following passages: "We find you are trying to sell a bit of yeast, but cannot understand such a dirty action on your part, which is anything but straightforward and honourable; however, every dirty action finds its own level, and we hope before very long it will be in your case. . . . . If you had known anything of the yeast business before you took on with us it would have been another matter, or if you had served any apprenticeship, if you had run straight and banked prompt and attended to the customers, but you know exactly how you carried on the business, which was not to our interest." The defendant Williams followed up this letter by calling upon Mr. Hopkins on February 25, 1919, and asking him to give immediate notice to terminate the plaintiff's engagement, stating that if he did not do so he (the defendant Williams) would bring the matter before the Association. Mr. Hopkins refused to give the notice, whereupon the defendant Williams, on March 1, 1919, issued a notice convening an emergency meeting of the Association for March 6, 1919, appending to such notice the following agenda—namely, "To consider a reduction in price of yeast and the necessity of members complying with rules 18—20." Rules 18 and 19 have nothing to do with this case—the former provides that all business transacted at meetings shall be treated as confidential, and the latter deals with entrance fees and subscriptions. The meeting was duly held on March 6,

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1919, and Mr. Hopkins and all the defendants, besides a number of other retail yeast dealers, were present. After the question of the reduction of prices (which has no bearing on this case) had been discussed, and the reduced prices had been settled, the defendant Williams complained that Mr. Hopkins had not carried out rule 20, and again asked him to give the plaintiff immediate notice to leave as his (the defendant Williams') customers were being taken away. The other members present joined in this request, expressing their opinion that Mr. Hopkins had done "a dirty action" in engaging the plaintiff, and no doubt using such arguments as occurred to them in order to try and induce Mr. Hopkins to give the notice. However, Mr. Hopkins refused point blank to accede to their request, and eventually a resolution was proposed and carried that a small committee be formed "to get the question in dispute settled between Mr. Hopkins and Mr. T. D. Williams." Three members present (including the defendant Thomas, but none of the other defendants) were chosen to act as the committee, and all the members then went to have tea in another room. During this meal the matter was further discussed, but no conclusion was arrived at. After tea the bulk of the members who had been present at the meeting (including the defendants Thomas, Reynolds and Rice) left, but the discussion was continued by the remaining members, and ultimately Mr. Hopkins promised to give the plaintiff a month's notice to terminate his engagement. In accordance with his promise Mr. Hopkins on March 15, 1919, handed to the plaintiff a written notice in the following words: "I regret (owing to Association rules) to give you 28 days' notice from this date to terminate all contracts between us. Dated this 15th day of March, 1919." In consequence of this notice the plaintiff left Mr. Hopkins' employment on April 12, 1919. In these circumstances the plaintiff commenced this action, claiming damages and an injunction to restrain the defendants (*a*) from interfering in any manner with any person or persons company or corporation, with a view to causing such person or persons, company or corporation to break his or their contract or

contracts with the plaintiff or to cease to employ or supply him or to abstain from entering into contracts with him; and (*b*) from in any manner otherwise interfering with the plaintiff in following his calling or obtaining or retaining employment.

In his statement of claim the plaintiff alleged that at the meeting of the Association on March 6 pressure was put upon Mr. Hopkins to observe rule 20, and to terminate the employment of the plaintiff in accordance with that rule, and that the defendants had taken advantage and availed themselves of their position and influence as officers of the Association to prevent the plaintiff from retaining and obtaining employment in his calling, and had unlawfully interfered with his right and freedom to dispose of his labour according to his will. The defendants in their defence denied the allegations of the plaintiff, and pleaded that rule 20 was framed and used only for the due protection of the business of the members of the Association by enabling any member to prevent any other member from improperly taking away customers of the first member by employing a traveller, manager or agent recently employed by him.

Owen Thompson K.C. and *Roope Reeve* for the plaintiff. The principle on which the Court acts in these cases is laid down in *Quinn* v. *Leathem* (1); *Giblan* v. *National Amalgamated Labourers' Union* (2); *Pratt* v. *British Medical Association* (3); *Valentine* v. *Hyde*. (4) The present case is the converse of *Quinn* v. *Leathem* (1). There there was a combination of workmen to injure an employer. Here there is a combination of employers to injure a workman, and the action of one individual is as obnoxious to the law as that of several if he has the power to influence the others. We say the dismissal of the plaintiff was the act of the Association; but if not, then it was the act of the defendant Williams and the other officials and therefore of the Association; but if not, then it was the act of the defendant

(1) [1901] A. C. 495, 510.
(2) [1903] 2 K. B. 600, 612, 618.
(3) [1919] 1 K. B. 244, 266, 268.
(4) [1919] 2 Ch. 129, 144, 146.

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Williams using his influence to obtain the dismissal of the plaintiff, for which he is personally liable. Rule 20 is in restraint of trade, because it is more than is reasonably necessary for the protection of the defendants' business, and is therefore void: *Mineral Water Bottle, Etc., Society* v. *Booth*. (1) Further, every person has a right under the law, as between himself and his fellow-subjects, to full freedom in disposing of his own labour according to his will (*Larkin* v. *Long* (2)), and the fact that the members of the Association were merely acting in obedience to a rule believed by them to be for their benefit is no defence to an action for procuring the breach of a contract, and that without justification: *Read* v. *The Friendly Society of Operative Stonemasons of England*. (3) Justification depends on the circumstances of each case: *Glamorgan Coal Co.* v. *South Wales Miners' Federation*. (4) Rule 20 cannot be invoked to do a wrong to a third person. The object of the rule is to advance trade interests and operate to prevent the plaintiff from canvassing Williams' customers for orders which he was entitled to do. We contend that the rule in its inception is an agreement to perpetrate a legal wrong, and also an illegal combination amounting to a conspiracy to prevent the plaintiff from obtaining his living in the wide area of the Association. The Trade Union Acts, 1871 and 1876, do not apply.

Jenkins K.C. and *C. Lyttelton Chubb* for the defendants. Admitting that rule 20 is in restraint of trade and not enforceable, it does not amount to an offence at common law, and the parties to it can act upon it if they like. The proposition that a man has by common law the right to the free disposition of his labour is too wide, and it is much too late in these days to say that a man can dispose of his labour without regard to the rights of others. An agreement in restraint of trade is not per se illegal: *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (5); *Attorney-General of Australia* v. *Adelaide Steamship Co.* (6), and to persuade a person to do

(1) 36 Ch. D. 465, 468.
(2) [1915] A. C. 814, 829–30.
(3) [1902] 2 K. B. 732.
(4) [1903] 2 K. B. 545, 563, 569; on appeal [1905] A. C. 239, 246.
(5) (1889) 23 Q. B. D. 598, 619; on appeal [1892] A. C. 25.
(6) [1913] A. C. 781, 793, 797.

or to abstain from doing what that person is entitled at his own will to do or to abstain from doing is lawful, although the result may be damage to another: *Allen* v. *Flood*. (1) We do not quarrel with the law laid down in *Quinn* v. *Leathem* (2) and *Pratt's Case* (3), but the onus is on the plaintiff to prove that the defendants brought about his dismissal by illegal means, i.e., coercion, such as threats, intimidation or undue pressure. Here there was nothing illegal in the means employed. Admitting that Hopkins would not have given the plaintiff notice if it had not been for the intervention of Williams, there was nothing illegal in drawing his attention at the meeting to rule 20 and asking him to abide by his own bargain. On the evidence there was no coercion. If Hopkins had at once agreed to dismiss the plaintiff on having his attention drawn to the rule, that would not have been coercion. What difference does it make because they argue with him and persuade him eventually to give the notice? He was in Court, and was not called to say that he was afraid or intimidated or in any way coerced. There is no power of expulsion in the rules and no penalty for a breach of the rules. We submit that rule 20 was framed with the view to benefit the employers and not with the view to injure employees. Coercion must be a wrongful act, but there was no hostile resolution, and there is nothing wrongful in peaceful persuasion. As regards the three co-defendants, no case whatever is made out against them. The only evidence is that they attended the meeting and expressed the view that Hopkins was acting dishonourably and in breach of rule 20.

Owen Thompson K.C. in reply. *The Mogul Case* (4) and *Allen* v. *Flood* (5) represent rather a different line of authorities to those that apply to the present case. Since *Quinn* v. *Leathem* (2) the cases deal more fully with coercion and pressure. Moral intimidation and pressure may amount to coercion, as in *Valentine* v. *Hyde*. (6) Here there was coercion

(1) [1898] A. C. 1, 151, 172–3.
(2) [1901] A. C. 495.
(3) [1919] 1 K. B. 244.
(4) [1892] A. C. 25.
(5) [1898] A. C. 1.
(6) [1919] 2 Ch. 129, 146.

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of the mind and will of Hopkins. There was a pressing force at the back of the request.

[P. O. LAWRENCE J. Must there not be a power to inflict injury ?]

Admitting that, here there was a close union of all the traders in West and Mid-Wales, and obviously it was a benefit to be a member and to be on good terms with each other. The refusal of Hopkins right up to the conclusion of the meeting supports the inference that strong language was used and pressure exerted. The mere absence of a rule of expulsion is immaterial. Hopkins would have been expelled by some means or other. Social injury is a sufficient driving force.

Cur. adv. vult.

Nov. 3. P. O. LAWRENCE J. (after stating the facts). At the trial the plaintiff proved to my satisfaction that he has suffered damages by his dismissal to the extent of at least 25*l.*, the sum which was claimed on his behalf at the Bar. There remains to be considered whether on the facts above stated the plaintiff has any cause of action. During the opening of the plaintiff's case the validity of rule 20 was attacked. In view of the decision in the *Mineral Water Bottle, Etc., Society* v. *Booth* (1), I have no hesitation in holding that this rule is void as being in unreasonable restraint of trade; in fact Mr. Jenkins on behalf of the defendants had to admit that the authority I have mentioned was conclusive on the point. I desire however to express my dissent from the argument addressed to me by Mr. Roope Reeve that rule 20 was unlawful from its inception because it amounted to an agreement to commit a tort, and from his further argument that rule 20 amounted to an unlawful conspiracy to deprive employees of their means of livelihood. I am inclined to think that the Association is a trade union within the meaning of s. 16 of the Trade Union Act Amendment Act, 1876, for the reasons expressed by Chitty J. in *Booth's Case* (2), and that therefore ss. 3 and 4 of the Trade Union Act, 1871, are applicable to the Association, but as this point has not

(1) 36 Ch. D. 465. (2) 36 Ch. D. 467–8.

been fully argued I prefer not to express any concluded opinion upon it. Apart altogether from the Trade Union Acts, however, I am of opinion that a contract merely because it is in unreasonable restraint of trade is not an offence at common law, the parties are always at liberty to act upon it if they think fit. Similarly combinations, not amounting to contracts, in restraint of trade were never unlawful at common law: see *Mogul Steamship Co.* v. *McGregor, Gow & Co.*, (1) and *Attorney-General of Australia* v. *Adelaide Steamship Co.* (2) Whatever may be the true construction of rule 20 I am clearly of opinion that it was inserted in the rules with the sole object of benefiting the members of the Association in their respective businesses, and not with the object of injuring the employees who might be adversely affected thereby, and that therefore it does not amount to a criminal or actionable conspiracy, although it is unenforceable for the reason stated.

The main point made on behalf of the plaintiff is that the defendants wrongfully coerced Mr. Hopkins into giving the notice terminating the plaintiff's engagement, and this point requires careful consideration and is not altogether free from difficulty. In my judgment it is settled law that a person who procures another to do an act, which is not wrongful so far as that other is concerned, can only be made legally responsible for its consequences if he has procured his object by the use of illegal means: *Allen* v. *Flood.* (3) This proposition equally holds good when the inducers are a combination of persons, at all events where the combination is formed for the purpose of protecting the common trade interests of the combining persons and the act procured is incident to that purpose: *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1) In the present case the defendants did not procure or attempt to procure Mr. Hopkins to commit an actionable wrong. Under his agreement with the plaintiff Mr. Hopkins was entitled to give notice to terminate the plaintiff's engagement, and it is not suggested that the plaintiff

(1) [1892] A. C. 25. (2) [1913] A. C. 781, 797.
(3) [1898] A. C. 1.

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has any cause of action against Mr. Hopkins. Further, I am clearly of opinion that the sole motive actuating the defendants in procuring or trying to procure Mr. Hopkins to dismiss the plaintiff was to protect what they conceived to be their common trade interests, and that all they did and said was incident to that motive. That being so the only question in my judgment to be decided is whether the defendants have used illegal means to procure their object. According to the plaintiff's contention the illegal means used by the defendants consisted of undue pressure brought by them to bear upon Mr. Hopkins. The onus of proving such pressure lies on the plaintiff. I have no doubt that at the meeting of March 6, 1919, all the defendants not only expressed in forcible language their opinion of Mr. Hopkins' conduct in having taken the plaintiff into his employ but also tried their utmost to persuade him to give immediate notice to terminate the plaintiff's engagement. That Mr. Hopkins ultimately and with reluctance yielded to the persuasion of the defendant Williams and some of his other fellow-traders is also beyond question. The plaintiff however (not unnaturally perhaps) did not call Mr. Hopkins as a witness. According to the evidence of the defendant Williams (the only witness called before me who was present at the meeting) no threat of any kind, open or disguised, was made to Mr. Hopkins as to the consequences in the event of his adhering to his refusal to discharge the plaintiff. I see no reason for disbelieving the defendant Williams' evidence on this point. I am asked however to infer that although no threat was made the position the defendants held as officers of the Association gave them an advantage over Mr. Hopkins and prevented him from exercising his own freewill. In my judgment the evidence is all against any such inference being drawn. The defendant Williams, although he held the important post of secretary to the Association, entirely failed to shake Mr. Hopkins' determination not to give notice on February 25, and the other defendants (the chairman, vice-chairman and treasurer) met with no greater success at the meeting on March 6. Mr. Hopkins seems to have held his

own throughout the discussion. It was only after the majority of the members (including the defendants Thomas, Reynolds and Rice) had departed that he was persuaded to alter his determination. That the discussion before tea was heated at times is I think probable, but it is evident that Mr. Hopkins was in no way intimidated and that he declined to be bullied or dictated to. Even before the adjournment for tea moreover the matter had come to be treated as if it were merely a dispute between the defendant Williams and Mr. Hopkins which was capable of amicable adjustment by a small committee. After tea a calmer atmosphere seems to have prevailed and a more friendly attitude all round adopted. The comparatively few members who were left appear to have accomplished their object by tactful persuasion, having discovered that Mr. Hopkins was not to be moved by abuse or bluster. I have grave doubts how far on the evidence any of the defendants, other than the defendant Williams, can properly be said to have been party to procuring the plaintiff's dismissal at all. But then it is said that Mr. Hopkins in agreeing to discharge the plaintiff must have been influenced by the injurious consequences which would have followed if he had not yielded to the defendants' persuasion. I asked Mr. Owen Thompson to suggest what those consequences would have been but was unable to obtain any satisfactory answer. The rules did not permit of his expulsion from the Association, nor of any other penalty being imposed upon him. I have already held that no threat of expulsion or penalty was ever made. Indeed the defendant Williams asserted that even if expulsion were possible and had been enforced, Mr. Hopkins would have suffered no disadvantage in his business by ceasing to be a member of the Association. Some vague suggestion was made by Mr. Owen Thompson that Mr. Hopkins if he had remained obdurate would have been ostracised by his fellow-traders or would at all events have incurred their displeasure and thereby suffered some injury or annoyance. In the absence of any evidence as to the social or business relations of Mr. Hopkins with his fellow-traders, or as to the nature of the consequences which it was

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suggested would have followed if he had incurred their displeasure, I cannot pay any serious attention to these suggestions. In the result I do not consider myself at liberty to infer that Mr. Hopkins was in any way intimidated or actuated by any fear of the consequences when he consented to discharge the plaintiff. It was further argued that apart from any threats, intimidation or fear of consequences there was a driving force behind the defendant Williams in the shape of the Association, which made the requests by him and his fellow-officers equivalent to a demand which Mr. Hopkins could not prudently ignore, and that therefore the requests made in this case by the defendants amounted to coercion. No doubt coercion may vary infinitely under different circumstances (see *Pratt's Case* (1) and *Valentine* v. *Hyde* (2)); but when carefully examined the argument which I am now considering is really the same argument in another garb as the last preceding one with which I have dealt. In order to enable me to hold that the Association acted as a driving force in the sense contended for it is in my view necessary to have evidence that the Association or its officers by reason of their position had some power to injure Mr. Hopkins or that it would in some way be disadvantageous to Mr. Hopkins to incur the illwill, of the officers or members of the Association, and that the fear of such power being exercised or of such illwill being incurred had driven Mr. Hopkins to do an act which he would otherwise not have done. As before stated I have come to the conclusion that neither the Association nor its officers had any such power, and that there is no evidence from which I could properly infer that Mr. Hopkins would suffer any such disadvantage or had any such fear. In coming to this conclusion I am not unmindful of what has been said by many judges, that a man can often resist the pressure of a single individual, whereas if the same pressure is applied by a number it becomes practically irresistible, and therefore amounts to coercion, but in my judgment this reasoning only applies to undue pressure by acts of molestation, intimidation or annoyance

(1) [1919] 1 K. B. 244, 262. (2) [1919] 2 Ch. 129, 144.

or by threats (open or disguised) to injure, molest or annoy and not to lawful pressure by persuasion unaccompanied by any such acts or threats.

In the result I have come to the conclusion that in the present case the plaintiff has failed to prove that there was any coercion practised by the defendants in order to induce Mr. Hopkins to discharge the plaintiff or that the defendants used any other illegal means to procure Mr. Hopkins to give the notice terminating the plaintiff's engagement. This conclusion is sufficient to entitle the defendants to judgment, but before parting with the case I desire to say a few words about the cases of *Quinn* v. *Leathem* (1) and *Giblan's Case* (2), which were so much relied upon by Mr. Owen Thompson. The essential distinction between those cases and the present one lies in my opinion in the fact that in those cases illegal means had been used to procure the acts which resulted in damage to the respective plaintiffs whereas in the present case I have held that that element is absent. In *Quinn* v. *Leathem* (1) the basis of the decision was that the defendants had unlawfully conspired to do harm to Munce, a valuable customer of Leathem, in order to compel Munce to do harm to Leathem. This is apparent from all the speeches of the learned Law Lords, and the various passages from those speeches quoted to me must all be read in light of that cardinal fact. So in *Giblan's Case* (2), unlawful means were used by the defendants. This appears clearly from the questions put to the jury and their answers. (3) The plaintiff's employer in that case was coerced into discharging the plaintiff by a threat to call out the other men in his employment. The real question debated was whether in the circumstances of that case there existed sufficient justification or excuse for the action taken by the defendants, and it was held that the action of the defendants could not be justified. It must be remembered that the *Glamorgan Case* (4) had been argued before the same tribunal shortly after the arguments in *Giblan's Case* (2) had been concluded, and that the reserved

(1) [1901] A. C. 495.
(2) [1903] 2 K. B. 600.
(3) [1903] 2 K. B. 608.
(4) [1903] 2 K. B. 545.

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judgments in both cases were delivered subsequently on the same day. In the *Glamorgan Case* (1) it was held that to procure the breach of a contract is an actionable wrong *unless there be sufficient justification for the interference.* In other words, that a person can escape legal responsibility for the consequences of an act procured by him, even though such act be illegal, if it can be shown that there was sufficient justification for the interference. I think there is good ground for suggesting that in *Giblan's Case* (2) the Court, in view of the observations occurring in several of the opinions in *Quinn* v. *Leathem* (3), considered that the same kind of principle would be applicable to the case where an act lawful in itself had been procured by illegal means, that is to say, that if on an investigation of the facts it were found that although the means used to procure the act were prima facie illegal yet there might be circumstances which would justify or excuse the use of such means. I am bound to say however that I share the difficulty felt by McCardie J. in *Pratt's Case* (4) of imagining any circumstances which would afford a justification for the use of illegal means. From the foregoing remarks it will be seen that in my opinion, if my conclusion that no illegal means were used by the defendants in the present case is right, neither *Quinn* v. *Leathem* (3) nor *Giblan's Case* (2) have any real bearing on the present case. The action will be dismissed with costs.

Solicitors for the plaintiff : *Corbin, Greener & Cook.*
Solicitors for the defendants : *Indermaur & Brown.*

(1) [1903] 2 K. B. 545.
(2) [1903] 2 K. B. 600, 608.
(3) [1901] A. C. 495.
(4) [1919] 1 K. B. 244, 266.

H. L. F.

In re HAILES AND HUTCHINSON'S CONTRACT.

ASTBURY J.

1919

Nov. 28; *Dec.* 3.

[1919. H. 2329.]

Vendor and Purchaser—Contract—Title—Vendor selling as Trustee—Trust to divide—One Beneficiary to have 30l. more than Others—No express Power of Sale—Offer to join Beneficiaries—Subsequent Repudiation of Contract.

A husband gave and bequeathed his real and personal estate to his wife and the vendor upon trust to pay the income to his wife for life and after her decease he directed the whole to be divided amongst his children as his wife should by will direct.

The wife survived, and by her will directed her husband's estate to be divided amongst the children so that one child should receive 30*l.* more than the others, but otherwise in equal proportions, and she appointed the vendor her executor.

After the wife's death the vendor, who had in fact obtained the verbal consent of the beneficiaries, contracted to sell the real estate as trustee of the husband's will.

In her first requisition the purchaser objected that the vendor had no power of sale, declined to accept the title, and asked for the return of her deposit. Her other requisitions dealt with formal points.

In reply the vendor submitted that there was an implied power of sale for the purpose of the division actually directed, "and if required all the beneficiaries are prepared to concur in the conveyance."

Further correspondence ensued in which the purchaser, though insisting on her first requisition, also dealt with the formal requisitions:—

Held, that there was no definite and clear repudiation of the contract before the complete beneficial title was offered, and the purchaser must be held to her bargain.

Observations in *In re Head's Trustees and Macdonald* (1890) 45 Ch. D. 310, 317; *In re Baker and Selmon's Contract* [1907] 1 Ch. 238, 243; and *In re Atkinson and Horsell's Contract* [1912] 2 Ch. 1, 11 applied.

Whether, having regard to *Mower* v. *Orr* (1849) 7 Hare, 473, 475, and *Cornick* v. *Pearce* (1848) 7 Hare, 477, the division actually directed gave the vendor an implied power of sale, quaere.

VENDOR AND PURCHASER SUMMONS.

By his will dated July 14, 1891, Henry F. Hailes, hereinafter called the husband, after appointing his wife and his son Walter (the vendor) joint executors and making certain specific bequests gave and bequeathed the remainder of his estate, both real and personal, unto his executors upon trust to pay the income to his wife for life, "and after her decease I direct the whole of my residuary estate and effects to be

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divided amongst such of my children as may then survive as and in such manner as my said wife may direct by her last will."

The husband died on October 21, 1892, and his will was proved by his wife and the vendor. He left four children—namely, the vendor, Bertha, James and Ethel, all now living and of age.

By her will dated December 5, 1902, the wife directed that her husband's residuary estate should be divided between such of his children as should be living at her decease in such proportions and so that Bertha if living should receive 30*l.* more than her brothers and sister, but otherwise in equal proportions, and she appointed the vendor her sole executor.

The wife died on April 14, 1919, and the vendor proved her will.

At the wife's death the husband's residuary estate consisted of 1581*l.* Midland Railway 2½ per cent. Debenture Stock and a freehold house, 16, Harringay Road, Hornsey, let to a tenant, so that there was enough personalty to provide for Bertha's extra 30*l.* on division without resorting to a sale of the house or making provisions for owelty on partition thereof.

On June 27, 1919, the vendor, having obtained the verbal consent of his brother and sisters, put up the house for sale by auction. The particulars described the vendor as trustee of H. F. Hailes deceased. The conditions required a 10 per cent. deposit and fixed July 28, 1919, as the date of completion, with a provision for payment of interest in case of delay, time not being made of the essence of the contract in this respect. The title was to commence with a conveyance on sale dated December 19, 1873 (being the conveyance to the husband). On completion the purchaser was to have a proper assurance executed by the vendor and all other necessary parties, such assurance and every other instrument required by the purchaser for getting in any outstanding estate title or interest or for completing the vendor's title to be prepared at the purchaser's expense.

The purchaser bought the house for 305*l.*, and paid 30*l.* 10*s.* deposit. The abstract was delivered on July 9, 1919. The requisitions were sent in on July 18. By requisition 1 the purchaser's solicitor objected that the vendor had no title, declined to accept the title deduced, and asked for the return of her deposit, pointing out that there was merely a direction for division of the husband's estate. The other requisitions dealt with formal points, such as the production of a plan and estate duty receipt, which the vendor was ready to comply with.

On July 31, 1919, the vendor's solicitors answered the requisitions. As to requisition 1, they submitted that the husband's will, with the wife's execution of the power read into it, implied a power of sale for the purpose of the division actually directed, which power was now exercisable by the vendor as surviving trustee of the husband's will, "and if required all the beneficiaries are prepared to concur in the conveyance."

On August 1 the purchaser's solicitor wrote stating that it was his duty to see that the purchaser got a good title; that the answer to requisition 1 was very unsatisfactory, and the requisition was repeated; that he would lay the matter before his conveyancing counsel, and if he were of opinion that a good title was shown, of course the purchaser must accept it. He also again asked for the plan and the estate duty receipt.

On August 6 the purchaser's solicitor laid the case before counsel, and on August 13 he wrote stating that counsel advised that a mere direction to divide did not imply a power of sale, which was only implied in a case of necessity, which was not the case here, however convenient a sale might be. He declined to accept the title and asked for the return of the deposit forthwith.

On October 27 the vendor issued this summons for a declaration that he was entitled to sell and convey the house or (alternatively) that he was so entitled with the concurrence of the beneficiaries; that the requisitions had been sufficiently answered, and a good title shown in accordance with the contract.

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J. W. Manning for the vendor. Reading the wife's appointment into her husband's will, there is a direction to divide the husband's estate so that Bertha gets 30*l.* more than the other children. This imports a division of liquid assets and implies a power of sale: *Mower* v. *Orr* (1); Farwell on Powers, 3rd ed., pp. 84, 328.

Secondly, the vendor sold with the consent of the beneficiaries and offered to join them when his power of sale was questioned. That cured the defect, if any: *In re Baker and Selmon's Contract* (2) approved in *In re Atkinson and Horsell's Contract.* (3) In *In re Head's Trustees and Macdonald* (4) Fry L.J. evidently thought that a vendor trustee could enforce a contract in such a case, and his observations were approved by the Privy Council in *Brickles* v. *Snell.* (5)

R. L. Ramsbotham for the purchaser. In *Mower* v. *Orr* (1) there was a direction to invest. That is not so here, and there is enough personalty for Bertha's extra 30*l.* without resorting to a sale. A mere direction to divide does not imply a power of sale: *Cornick* v. *Pearce.* (6)

Secondly, the offer of the new title was too late. In *In re Baker and Selmon's Contract* (2) the trustee sold at the written request of all the beneficiaries so that he could compel them to join. He produced this written request before repudiation. In addition to this the particular contract did not really imply that the vendor was selling under a trust for sale.

In the present case the title was immediately repudiated in requisition 1. The other formal requisitions were delivered so as to be in time in case it should be held that there was an implied power of sale and no ground for repudiation. The purchaser did not accept the vendor's offer to join the beneficiaries, but repeated her first requisition. The vendor had merely got the verbal consent of the beneficiaries, not their written request, and non constat that he could compel them to join. If the purchaser had negotiated at

(1) 7 Hare, 473, 475.
(2) [1907] 1 Ch. 238, 243.
(3) [1912] 2 Ch. 1, 11.
(4) 45 Ch. D. 310, 317.
(5) [1916] 2 A. C. 599, 608.
(6) 7 Hare, 477.

all on the new title offered her real right would have been to have the contract ratified by the beneficiaries, and not to their mere joinder in the conveyance: *Lee* v. *Soames.* (1) But being dissatisfied with her bargain, and not feeling inclined to accept a new title, she was entitled to stand on her strict rights and adhere to her repudiation: *Forrer* v. *Nash* (2); *Brewer* v. *Broadwood.* (3)

ASTBURY J. (after stating the facts). It is plain that a good title has been offered but the purchaser wishes to take advantage of a technical point to get out of the purchase. There are two questions: first, whether the vendor has an implied power of sale, and secondly, whether the offer to join the beneficiaries was made in time.

As to the first point, it is not quite clear on the authorities such as *Mower* v. *Orr* (4) and *Cornick* v. *Pearce* (5) whether the joint effect of the two wills does or does not give the vendor a power of sale.

It is clear that the husband directed his real and personal estate to be divided at his wife's death amongst his then surviving children in such manner as she should direct by her will, and that she directed it to be divided in such proportions and so that Bertha should receive 30*l.* more than her brothers and sister, but otherwise in equal proportions. Although there is enough personalty to pay this extra 30*l.*, it may well be that the direction to divide in this way implies a power of sale.

Assuming however that there is a doubt on this point, the second question is whether there was a valid repudiation before a complete title was offered.

In *Forrer* v. *Nash* (2) Romilly M.R. said: "When a person sells property which he is neither able to convey himself nor has the power to compel a conveyance of it from any other person, the purchaser, as soon as he finds that to be the case, may say, 'I will have nothing to do with it.'" That however was not the attitude taken up by the

(1) (1888) 36 W. R. 884.
(2) (1865) 35 Beav. 167, 171.
(3) (1882) 22 Ch. D. 105, 109.
(4) 7 Hare, 473, 475.
(5) 7 Hare, 477.

EASTBURY J. 1919 HAILES AND HUTCHINSON'S CONTRACT, *In re.*

purchaser in this case. She merely declined to accept the title in the first of a set of requisitions dealing with the absence of a power of sale and other points on the title. Before any further steps were taken there was a plain offer to join the beneficiaries, with a statement that they were all prepared to concur in the conveyance. After that offer there was further correspondence dealing with the first and other requisitions, and on the whole I have come to the conclusion that there was no definite and clear repudiation before the complete beneficial title was offered. There is no substance in the purchaser's objection, and there is no reason why she should escape from her bargain on a technical point like this.

In *In re Head's Trustees and Macdonald* (1) Fry L.J. said: "The objection having been taken to the title, the vendors said that they would obtain the concurrence of the beneficiaries. Now, if that had been done at an early stage of the proceedings, and if the trustees had been able to shew that the beneficiaries did in fact consent to join, and an opportunity had been given of investigating their title, and it had been shown that they would concur in reasonable time, it is by no means clear to me that the vendors might not have enforced their contract. It is not necessary to decide that point." That expression of opinion was approved in *Brickles* v. *Snell.* (2)

In *In re Baker and Selmon's Contract* (3) the contract provided that the vendor, the trustee of Baker's will, was selling under the trusts and powers vested in him thereunder. It also provided that the life-tenant would join to release her life interest. The vendor had in fact the legal estate but no power or trust for sale, and the joinder of the life-tenant was wholly insufficient to make a good title. But though not stated in the contract, the vendor had in fact entered into the contract at the written request of the life-tenant and all the other beneficiaries, including himself, so that he could compel them to join, and Swinfen Eady J. held that he had shown a good title in accordance with the contract. He said: "In my opinion, the beneficiaries having authorized

(1) 45 Ch. D. 310, 317. (2) [1916] 2 A. C. 599, 608.
(3) [1907] 1 Ch. 238, 243.

and requested the vendor trustee in writing to sell the property, and the vendor having entered into the contract in pursuance of that written authority, the beneficiaries were legally bound to carry out the contract and concur in the conveyance. The vendor, who had sold at their written request, could compel them to join to enable him to carry out the contract. Seeing, therefore, that at the date of the contract the legal estate was vested in the vendor as trustee, that he had the written request of all the beneficiaries to sell, and entered into the contract in pursuance of that request, so that he had a right to compel their concurrence, I am of opinion that the vendor has shown a good title."

In that case, no doubt, the sale was at the written request of the beneficiaries, so that they were bound to concur at the trustee's request. In the present case there is no evidence that it was made at their request. But it was made with their consent, and in answer to the first requisition it was stated that they were prepared to concur, as I have no reason to doubt they were.

In re Baker and Selmon's Contract (1) was approved by the Court of Appeal in *In re Atkinson and Horsell's Contract.* (2) Cozens-Hardy M.R., after pointing out that the decision was perfectly right, said: "That was a case where the trustee said 'I am selling under a trust for sale.' The fact was that there was no trust for sale. He was not in a position as trustee for sale to make a title, but he was in a position to make a title with the concurrence of the beneficiaries who had prior to the contract of sale authorized him to sell. That was a title which the purchaser was bound to take, though it was very different from that for which he bargained. It involved an investigation of the title which would have been unnecessary if there had been a mere trust for sale, and it involved questions of duty and many matters of that kind, and a different abstract from that required under the contract of sale."

In the present case there was no absolute repudiation before the purchaser was told that a complete beneficial

(1) [1907] 1 Ch. 238, 243. (2) [1912] 2 Ch. 1, 11.

ASTBURY J. 1919 HAILES AND HUTCHINSON'S CONTRACT, *In re.*

title could be shown, and that all the beneficiaries were prepared to concur in the conveyance.

There will therefore be a declaration that the vendor, with the concurrence of the beneficiaries, can make a good title, but, the purchaser undertaking not to appeal, there will be no order as to costs.

Solicitors: *W. J. & E. H. Tremellen; Walter A. Jennings.*

G. R. A.

ASTBURY J. 1919 *Dec.* 18.

In re CROSSE.
OLDHAM *v.* CROSSE.

[1919. C. 2007.]

Will—Annuity—Wife's Settlement Income—Direction to augment—"Clear annual sum of 4,000l. a year free from income tax"—Super-tax—Finance (1909–10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 66—*Finance Act*, 1914 (4 *& 5 Geo.* 5, *c.* 10), *s.* 3.

By his will made in 1915 a testator directed his trustees out of the income of his residuary estate to pay his wife during widowhood the sum requisite to make up her marriage settlement income to "the clear annual sum of 4000*l.* a year free from income tax":—

Held, that the wife was entitled to the 4000*l.* a year free from super-tax as well as ordinary income tax.

In re Crawshay [1915] W. N. 412 distinguished.

ORIGINATING SUMMONS.

By his will dated May 6, 1915, the testator, after appointing his son Edmund and the plaintiffs executors and trustees and making certain bequests, devised and bequeathed his residuary real and personal estate to his trustees upon trust for sale, and directed them (after paying his funeral and testamentary expenses, debts and legacies) to stand possessed of the proceeds and the income thereof upon trust to pay his wife during her widowhood out of the income "such a sum as may be requisite to make up, together with the income payable to her under the settlement made in contemplation

of our marriage (which settlement I hereby confirm), the clear annual sum of 4000*l.* a year free from income tax (which is to be borne by my residuary estate), such sum to be payable in advance by equal quarterly payments in each year, and the first of such quarterly payments to be made immediately after my death."

The testator then empowered his trustees to set apart and appropriate a sufficient part of the residuary fund to provide for the payment of this annual sum, with power to resort to capital if the income of the appropriated fund proved insufficient. On the death or remarriage of his wife the appropriated fund was to revert to the residuary fund.

The testator then declared that subject to the trusts aforesaid the residuary fund and the income thereof should be held upon trust for such of his sons Edmund, Arthur, Victor, Russell and Edward as should be living at his death and attained twenty-five, or died under that age leaving issue, in equal shares, the shares other than Edmund's being settled.

The testator died on November 21, 1918, leaving his wife and his five sons surviving. Edmund and Arthur had attained twenty-five. Arthur, Victor, Russell and Edward were unmarried.

The income under the marriage settlement of October 25, 1889, was now payable to the wife. The net income received by the settlement trustees and paid to the wife was about 910*l.*, the gross income before deduction of income tax being about 1300*l.*

The income of the testator's residuary fund was very considerable. The wife had no property other than the income under the settlement and the will.

In October, 1919, the plaintiffs issued this summons to determine (inter alia) whether the annual sum of 4000*l.* was to be made up so as to be free of super-tax as well as ordinary income tax.

Whitmore Richards and *J. I. Stirling* for the plaintiffs.

Dighton Pollock for the widow. Super-tax was imposed as

ASTBURY J. 1919 CROSSE, *In re.* OLDHAM *v.* CROSSE.

"an additional duty of income tax" by the Finance (1909–10) Act, 1910, s. 66. It was originally imposed on incomes exceeding 5000*l.*, but this exemption limit was reduced to 3000*l.* by the Finance Act, 1914, s. 3, in the testator's lifetime, and it has since been reduced to 2500*l.* by the Finance Act, 1918 (8 & 9 Geo. 5, c. 15), s. 20. The tax is merely an additional income tax: *Bowles* v. *Attorney-General* (1); *Inland Revenue Commissioners* v. *Brooks* (2); *Brooke* v. *Inland Revenue Commissioners.* (3) The widow must therefore have her settlement income made up to 4000*l.* a year free from income tax in its legal sense, which includes super-tax.

In re Crawshay (4) is obviously distinguishable. In that case a testator who died in 1903, long before super-tax came into existence, directed his trustees to make up his wife's income under a certain deed to the sum of 2500*l.* "clear of all deductions, including income tax." Peterson J. held that the words "clear of all deductions" could not include super-tax, which was clearly not a deduction in any sense and for which the trustees were not accountable. The present will does not mention "deductions," the meaning of which is a matter of construction in every case, e.g., *Lord Lovat* v. *Duchess of Leeds* (5); *In re Bannerman's Estate* (6); *In re Saillard* (7); and there is no ground for limiting the words "free from income tax" to "free from deductible income tax." They mean "free from income tax" in the various Protean forms known to the testator.

J. H. Boraston for the sons. The present case is governed by *In re Crawshay* (4), the expression "clear annual sum" being equivalent to "free from all deductions," which in this will would include deductible income tax.

Although super-tax is an additional income tax for many purposes, e.g., the machinery of assessment: *Bowles* v. *Attorney-General* (1), or the liability of a person resident abroad: *Brooke* v. *Inland Revenue Commissioners* (3); in many

(1) [1912] 1 Ch. 123, 134–136.
(2) [1915] A. C. 478, 482, 485, 489, 492, 496.
(3) [1918] 1 K. B. 257, 266, 267.
(4) [1915] W. N. 412.
(5) (1862) 2 Dr. & Sm. 62.
(6) (1882) 21 Ch. D. 105.
(7) [1917] 2 Ch. 401, 403.

respects, and certainly in ordinary parlance, it is a different tax. Income tax is paid by the trustees as agents for the widow, but they have nothing to do with super-tax, for which she alone is accountable. In the present case the super-tax was imposed five years, and the exemption limit reduced one year before the will, and if the testator had really meant to give his widow the super-tax, he would obviously have mentioned it, as in *In re Bowring*. (1)

ASTBURY J. [after stating the facts and dealing with a subsidiary point :] The question as to the super-tax is more difficult. The will was made on May 6, 1915—i.e., five years after the imposition of the super-tax and one year after the exemption limit was reduced to 3000*l*. The question is whether the testator intended the 4000*l*. to be free of income tax and super-tax or only of income tax strictly so called.

In order to decide this I must first ascertain what super-tax really is. It was first imposed by the Finance (1909–10) Act, 1910, s. 66, which provides that in addition to the income tax there shall be charged on incomes exceeding 5000*l*. "an additional duty of income tax (in this Act referred to as a super-tax)." The 5000*l*. limit was reduced to 3000*l*. by the Finance Act, 1914, s. 3, passed on July 31, 1914.

By the phrase "clear annual sum of 4000*l*. a year free from income tax" the testator may have meant a clear annual sum free from income tax in its original sense, or he may have meant a clear annual sum free from income tax in its extended meaning, including super-tax.

There is only one authority discussing this direct question on the construction of a will—namely, *In re Crawshay* (2)—which I will deal with presently. But, on the question as to what super-tax really is, the observations of Parker J. in *Bowles* v. *Attorney-General* (3) have been generally accepted. In that case the issue was whether the super-tax was one of the "duties of income tax" within the Customs and Inland Revenue Act, 1890 (53 & 54 Vict. c. 8), s. 30, so that returns

(1) [1918] W. N. 265. (2) [1915] W. N. 412
(3) [1912] 1 Ch. 123.

ASTBURY J. 1919 CROSSE, *In re.* OLDHAM *v.* CROSSE.

might be required before the annual tax was actually imposed. But in giving judgment Parker J. expressed his view as to the legal meaning of super-tax.' He said (1): "The only question I have to decide . . . . is whether [s. 30] applies not only to ordinary income tax, but to super-tax as well. In other words, I have to determine whether super-tax is a 'duty of income tax' within the meaning of this section." He then referred to the Finance (1909–10) Act, 1910, and the definition in s. 66, and continued (2): "The super-tax, therefore, is an additional income tax imposed on individual incomes exceeding a specified amount," and later he said (3): "The super-tax is in fact an income tax. It is referred to in the Act which imposes it as an additional duty of income tax. It is collected and recovered by means (with some special and additional provisions) of the ordinary income tax machinery. It is intended, like the ordinary income tax, to be a permanent tax, though imposed annually only," and he held that it was a duty of income tax within s. 30.

In *Brooke* v. *Inland Revenue Commissioners* (4), where the question was whether a person resident abroad was liable for super-tax on income derived from property in England, Swinfen Eady L.J. said (5): "Super-tax . . . . is merely an additional income tax—that was pointed out in *Bowles* v. *Attorney-General* (6); and it is charged in respect of the income of any individual," and again (7): "I fail to see why there should be any difference between super-tax and the rest of income tax, or what distinction can be drawn between them."

I therefore start with the fact that in law super-tax is merely an additional income tax, and I must bear that in mind in construing the will.

It has been decided in many will cases that if an annuity is directed to be payable without any deduction whatever, or if the words were a clear yearly sum free from all deductions and abatement whatsoever, such a gift in those terms is not

(1) [1912] 1 Ch. 134.
(2) [1912] 1 Ch. 135.
(3) [1912] 1 Ch. 136.
(4) [1918] 1 K. B. 257.
(5) [1918] 1 K. B. 266.
(6) [1912] 1 Ch. 123.
(7) [1918] 1 K. B. 267.

sufficient to give the legatee the income tax in addition, but he must bear it himself. On the other hand, it has been determined more than once that if a testator uses language showing that when he uses the word "deductions" he intends to include income tax as a deduction, then the gift will be free of income tax. See for instance *Lord Lovat* v. *Duchess of Leeds* (1); *In re Bannerman's Estate* (2); *In re Saillard.* (3)

In the present case the testator does not use the terms "without any deductions" or "free from all deductions," but directs his trustees to pay his wife "such a sum as may be requisite to make up together with the income payable to her under the settlement . . . . the clear annual sum of 4000*l.* a year free from income tax."

As super-tax is merely a form of income tax I think this is a clear provision that the wife is to take the 4000*l.* clear of both income tax and super-tax.

At first sight this view may seem contrary to *In re Crawshay.* (4) In that case by a deed poll of 1880 the testator appointed to his wife 1500*l.* a year "free of all deductions except income tax." By a codicil of 1900 he bequeathed her during widowhood such a sum as together with the income received by her under the appointment would make up an annual sum of 2000*l.* "clear of all deductions including income tax," and by a codicil of 1901 he increased this amount to 2500*l.* The testator died in 1903, so that the codicils were made and the testator died long before super-tax was thought of. The widow's income was of such an amount that she became liable to super-tax under the Finance Act, 1914, s. 3, which reduced the exemption limit to 3000*l.*, and the question was whether she was to have her 2500*l.* under the appointment and the codicils free of super-tax. Peterson J., after referring to decisions to the effect that a gift of an annuity "free from all deductions" would not free the annuitant from income tax, unless it was expressly included in the term "deductions," said that "trustees who had to pay an annuity were accountable

(1) 2 Dr. & Sm. 62.
(2) 21 Ch. D. 105.
(3) [1917] 2 Ch. 401, 403.
(4) [1915] W. N. 412.

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for the income tax, and in the ordinary course would, for the purpose of meeting their accountability, deduct the income tax before payment and only hand over the balance to the annuitant. In the present case his Lordship thought the testator treated income tax as a deduction and, by the directions in the codicil, meant 'I direct that nothing shall be deducted from the sum given, not even income tax.'" He thought that the testator was considering the income tax for which the respective trustees would be accountable in respect of the particular annuity or sum, and after pointing out that super-tax was not a charge in respect of any particular annuity or sum, but a charge in respect of the recipient's whole income, and not a matter with which the trustees would be charged or concerned, he held that the testator had merely given the widow the yearly sum of 2500*l.* clear of all deductions for which the trustees were accountable, and that those deductions did not include super-tax. In other words he held that by the expression "clear of all deductions including income tax" the testator was only referring to deductions that the trustees would properly make.

In the present case there is no provision that the clear annual sum of 4000*l.* is only to be clear of deductions that the trustees ought to make. It is to be a clear annual sum of 4000*l.* free from income tax. The ratio decidendi of *In re Crawshay* (1) does not apply. The testator has by plain and unambiguous language given his wife such a sum as may be requisite to make up together with her settlement income "the clear annual sum of 4000*l.* a year free from income tax." I see no reason to limit this to income tax strictly so called, and hold that it includes super-tax.

Solicitors: *Vizard, Oldham, Crowder & Cash.*

(1) [1915] W. N. 412.

G. R. A.

SARGANT J.
1919
Oct. 23.

In re PEARSON.
SMITH *v.* PEARSON.

[1919. P. 870.]

Will—Gift to Testator's Child—Decease of Child in Parent's Lifetime leaving Issue—Bankruptcy of Child—Title of Trustee in Bankruptcy—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 33—*Bankruptcy Act*, 1914 (4 *& 5 Geo.* 5, *c.* 59), *s.* 38.

A testator bequeathed a share in his residuary estate to his son. The son died in testator's lifetime, leaving issue who survived the testator, but having been adjudicated bankrupt without obtaining his order of discharge :—

Held, that the trustee in bankruptcy was entitled to the son's share in the residuary estate.

The dictum of Stirling L.J. in *In re Scott* [1901] 1 K. B. 228, 240, approved and followed.

Isaac Pearson by his will, dated April 5, 1911, appointed Henry Smith and Henry John Brown executors and trustees thereof, and gave his residuary real and personal estate to them upon trusts for conversion thereof, and to hold the proceeds in trust for his children Hannah F. J. Church, Thomas Stephen Pearson and Henry F. Pearson, in equal shares. The will contained a proviso that the trustees should deduct from and retain out of the share to which Thomas Stephen Pearson might become entitled the sum of 350*l.* due from him to the testator. On March 23, 1915, a receiving order in bankruptcy was made against T. S. Pearson on his own petition, and on the same day he was adjudicated a bankrupt. On March 29, 1915, the official receiver became, and at the date of these proceedings he was, the trustee in the bankruptcy. T. S. Pearson never obtained his order of discharge, and he died intestate, in the lifetime of the testator, on October 3, 1915, leaving four children, one of whom was Thomas Henry Pearson. The testator died on March 8, 1917, and his trustees and executors took out an originating summons, to which Thomas Henry Pearson and Thomas S. Pearson's trustee in bankruptcy were the defendants, raising the questions (1.) whether, by reason of the death intestate of T. S. Pearson

SARGANT J. 1919 PEARSON, *In re.* SMITH *v.* PEARSON.

in the lifetime of his father, leaving issue at the time of his father's death, his share in the estate went to his next of kin or to his trustee in bankruptcy; and (2.) whether the trustees, before paying over T. S. Pearson's share, should deduct therefrom the sum of 350*l.*

C. P. Sanger, for the plaintiffs, stated the facts, and referred to s. 33 of the Wills Act, 1837, and said that there was no actual decision on the questions raised by the summons.

R. H. Hodge for the defendant T. H. Pearson. Sect. 33 of the Wills Act, 1837, passed the interest of T. S. Pearson, to which he would have been entitled had he survived his father, to T. S. Pearson's next of kin, and they, and not the trustee in bankruptcy, are entitled to the third share which their father would have taken if he had survived his own father, the testator. T. S. Pearson himself never had vested in him, and was never at any time entitled to that share, and consequently it could not be "property of the bankrupt divisible amongst his creditors" within the meaning of s. 38 of the Bankruptcy Act, 1914; the share never devolved upon him. The trustee in bankruptcy has no decision in his favour, but will doubtless ask the Court to rely on a dictum.

G. T. Simonds (*W. R. Sheldon* with him) for the trustee in bankruptcy. It must be admitted that the trustee in bankruptcy takes the share of T. S. Pearson subject to the debt of 350*l.* due to the testator. But, subject to that, he is entitled to T. S. Pearson's share of residue. By virtue of s. 33 of the Wills Act, 1837, that share became part of his estate, subject, not only to his debts, but also to any disposition made by him either by will or otherwise. What Stirling L.J. said in *In re Scott* (1)—namely, that "if the child died an undischarged bankrupt, it"—the legacy—"will vest in the trustee in bankruptcy"—is no doubt only a dictum, but it should be adopted as a decision.

SARGANT J. I am surprised to find that the particular point raised by this summons has never been the subject of

(1) [1901] 1 K. B. 228, 240.

an actual decision. That question is as to the effect of s. 33 of the Wills Act, 1837, which provides that "where any person, being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will."

In the present case the testator gave a third of his residuary estate to his son T. S. Pearson, who was adjudicated a bankrupt before his father's death. Before the date of that death, a trustee in the bankruptcy was appointed, and T. S. Pearson was at the time of his own death an undischarged bankrupt. He left four children surviving him. All the conditions mentioned in s. 33 of the Wills Act were satisfied in the present case. It is observable that there is no gift under that section in favour of the issue of the deceased child of the testator. The provision made by the section is in favour of the legatee himself. The property coming to him under the section may be disposed of by him either during his lifetime or by his will, and, if he dies intestate, it passes to the persons entitled by the intestacy, and it is subject to the payment of his debts. The section, in short, effects an artificial prolongation of the legatee's life beyond the death of the testator, and he takes his legacy subject to all the conditions affecting him at the time of his own death. Prima facie then, the property passed at the time of the legatee's death as artificially ascertained by the section.

By s. 38 (*a*) of the Bankruptcy Act, 1914, it is provided that the property of the bankrupt divisible among his creditors shall comprise, amongst other things, all such property "as may devolve on him before his discharge," and Mr. Hodge, as counsel for the next of kin of T. S. Pearson, argued that the death of the bankrupt operated as a discharge from his bankruptcy, and that the consequence must follow

SARGANT J. 1919 PEARSON, *In re.* SMITH *v.* PEARSON.

that the share of T. S. Pearson in the residue did not devolve on him until after the determination of his bankruptcy. But s. 33 of the Bankruptcy Act, 1914, does not refer to property devolving during the continuance of the bankruptcy, but to property of the bankrupt devolving "before his discharge." As a matter of fact the bankrupt never did obtain his discharge. The effect of the artificial prolongation of his life by s. 33 of the Wills Act was to cause the property left to him to devolve on him before his discharge.

Moreover, there is the important statement of Stirling L.J. in *In re Scott* (1), which to my mind seems to amount to something stronger than a mere dictum, as the whole of the judgment is based on the principle involved in that statement. The learned judge said: "If the child, while living, entered for valuable consideration into any contract with reference to such property (as, for example, by way of sale or mortgage, or by way of covenant in a marriage settlement), by such contract the property will be bound. If the child made a will by which such property is, by appropriate language, disposed of, either specifically or otherwise, the property will pass under such disposition. If the child died intestate, the property will go to the persons entitled by law as upon an intestacy. If the child died an undischarged bankrupt, it will vest in the trustee in bankruptcy, and so on."

In my judgment, the trustee in bankruptcy of the child taking under his father's will, who is the general assignee of the bankrupt under the Act, is in quite as good a position as a special assignee, or devisee, or legatee of the child, or anyone else claiming under him.

I may add that the language of s. 38 of the Bankruptcy Act, 1914, is exactly the same as that in the corresponding s. 44 of the Bankruptcy Act, 1883. This seems to me to be some additional reason for the decision at which I have arrived. For the dictum of Stirling L.J. in *In re Scott* (1) gave a judicial interpretation of s. 44 of the Act of 1883; and afterwards this section was re-enacted verbatim in s. 33 of the Act of 1914.

(1) [1901] 1 K. B. 228, 239.

It must, therefore, be declared that the share of residue by the will of Isaac Pearson given to his son T. S. Pearson passed to the son's trustee in bankruptcy, subject to deduction of the sum of 350*l.* referred to in the will.

Solicitor for the plaintiffs : *R. H. Bentley, for T. G. Baynes, Dartford.*

Solicitors for the defendants : *Bentley & Jenkins ; Tarry, Sherlock & King.*

F. E.

In re POOL SHIPPING COMPANY, LIMITED.

[1919. P. 1107.]

Company—Bonus Shares—Letter of Renunciation in Favour of Nominee—"Transfer" of Shares—Power of Managers to refuse to register Nominee.

Letters of renunciation of bonus shares in favour of a nominee and of acceptance by that nominee do not, in the absence of special provisions to the contrary, amount to a "transfer" of shares so as to fall within and be subject to the articles of association of the company dealing with the transfer of shares of shareholders already registered.

MOTION for the rectification of the register of members of the defendant company in the following circumstances :—

The applicants were shareholders of the company, and all but one of them had renounced their rights to allotments of new shares in the company, and had requested the company to allot the shares to the remaining applicant, Coulson, who had agreed to accept the same.

The new shares were being allotted pursuant to special resolutions for increasing the capital of the company by capitalizing 125,000*l.*, part of the reserve fund, and distributing among the registered shareholders, or their respective nominees, 125,000 shares of 1*l.* each, fully paid, at the rate of one share for every four shares already issued.

On June 3, 1919, the managers, Sir R. Ropner & Co., Ld.,

PETERSON J. 1919 POOL SHIPPING COMPANY, LD., *In re.*

issued a notice in the form of a letter to each shareholder notifying him of the number of new shares to the allotment of which he was entitled, and stating that unless the managers heard from him to the contrary on or before the 9th inst. the new shares would be allotted to him, and adding: "Should you wish to renounce your right to such allotment in favour of some other person will you kindly have the letter of renunciation and letter of acceptance at foot of this form signed by yourself and your nominee respectively, and return us this form complete on or before the 9th inst." Appended were letters of renunciation and acceptance, as follows:—

LETTER OF RENUNCIATION.

The Pool Shipping Company, Limited.

Being entitled to an allotment of .... new shares of 1*l.* each, fully paid, in the above company, I/we hereby renounce my/our right to such allotment, and request you to allot the shares to .....

Signature..... Date.....

LETTER OF ACCEPTANCE.

The Pool Shipping Company, Limited.

I/we agree to accept the above shares, and desire to be entered on the Register of the Pool Shipping Company, Limited, in respect thereof.

Signature..... Date.....

When the applicant Coulson presented the letters of renunciation in his favour and his own letters of acceptance and applied to the company for the allotment of the shares to him, the managers refused to treat him as the person to whom the shares should be issued on the ground that Article 32 empowered them to refuse to register any transfer of shares of which they did not approve.

The applicants thereupon moved for rectification of the register by inserting therein Coulson's name as the holder of 311 shares of 1*l.* each in the company in addition to 16 shares already held by him.

The company in fact had no directors but was controlled

by Sir R. Ropner & Co., Ld., who in the articles of association were described as the "managers" of the company. The provisions of the material articles of association were as follows :—

Article 5 : "The shares shall be under the control of the managers, who may allot or otherwise dispose thereof to such persons on such terms and conditions and at such times as the managers think fit."

Articles 30 to 38 dealt with the "Transfer and Transmission of Shares."

Article 30 : "The instrument of transfer of any share shall be signed both by the transferor and transferee, and the transferor shall be deemed to remain holder of such share until the name of the transferee is entered on the register in respect thereof."

Article 31 dealt with the form of transfer.

Article 32 : "The managers in their absolute discretion and without assigning any reason therefor may refuse to register any transfer of shares of which they do not approve."

Articles 33 to 38 dealt with the lodging of transfers and evidence of title, retention of registered and return of rejected transfers, fees, closing of books, title to shares on death, and the shares of infants, lunatics, etc.

Article 46 : "The company in general meeting may, before the issue of any new shares, determine that the same, or any of them, shall be offered in the first instance to all the then members in proportion to the amount of capital held by them, or make any other provisions as to the issue and allotment of the new shares ; but in default of any such determination, or so far as the same shall not extend, the new shares may be dealt with as if they formed part of the shares in the original capital."

Article 47 : "Except so far as otherwise provided by the conditions of issue or by these presents, any capital raised by the creation of new shares shall be considered part of the original capital, and shall be subject to the provisions herein contained with reference to the payment of calls

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and instalments, transfer and transmission, forfeiture, lien, surrender, and otherwise."

Article 86 : " A general meeting of the company may direct the capitalization of the whole or any part of the reserve fund or funds of the company or of any sums standing to the credit of the profit and loss account of the company by distribution amongst the holders of the shares of the company (other than preference shares or other shares issued upon special conditions) of paid-up shares . . . . and the managers shall give effect to such resolution and apply such portion of the reserve fund or funds or profits of the company as may be directed to be capitalized for the purpose of making payment in full at par for the shares . . . . but no distribution shall be made unless recommended by the managers. . . . ."

Tomlin K.C. and *G. M. T. Hildyard* for the applicants. Article 32 does not authorize the managers to refuse to register the applicant Coulson. The group of articles dealing with the transfer of shares only applies to shares in respect of which there is a shareholder of the company already on the register, and this is not a transfer of shares, nor is anyone on the register in respect of them.

Hughes K.C. and *Whinney* for the respondents. This transaction amounts to an option under which the shareholder has the right to take the shares or to transfer that right to someone else. In substance it is a transfer of the shares, but by two steps instead of one.

Under Article 47 these shares are to be considered as part of the original capital and subject to the provisions of the articles of association.

[PETERSON J. When do you say the new capital is " raised " within the meaning of Article 47 ?]

When it is created or authorized. By Article 5 the shares are under the control of the managers, to allot or otherwise dispose of them as they should think fit. The group of articles dealing with " transfer and transmission " should, we submit, be read widely, and here the renunciation and acceptance are equivalent to a transfer. Either the effect of

renunciation and acceptance is a transfer to which Article 32 applies, or it is an original allotment to which Article 5 applies. Article 46 does not, and cannot, override Article 5.

PETERSON J. This is a motion by various persons asking that the register of members of the Pool Shipping Co., Ld., may be rectified by inserting therein the name of Samuel Twentyman Coulson as the holder of 311 shares of 1*l.* each. Under Article 5 the shares are to be under the control of the managers, who may allot or otherwise dispose of them to such person on such terms and conditions and at such times as the managers think fit. Article 46 deals with new shares created under the power to increase capital, and provides as follows. [His Lordship read Article 46 and continued :] That is to say, the company in general meeting may make such regulations as to the issue and allotment of new shares as they may think fit, but if the company do not do so then the new shares come under the provisions of Article 5, and are under the control of the managers.

Article 47 provides that except so far as otherwise provided by the conditions of issue or by the articles, any capital raised by the creation of new shares shall be considered part of the original capital and shall be subject to the provisions contained in the articles with reference to (inter alia) transfer.

Under Article 86 a general meeting of the company may direct the capitalization of the whole or any part of the reserve fund of the company by the distribution amongst the holders of the shares of the company of paid-up shares of the company, and the managers are to give effect to such resolution and apply such portion of the reserve fund as may be directed to be capitalized for the purpose of making payment in full at par for the shares so distributed.

Acting under these powers the company, with a view to dealing with the reserve fund, passed these two special resolutions. [His Lordship read the special resolutions and continued :] Following upon these resolutions the managers, on June 3, 1919, issued notices to the shareholders in the form of a letter stating the number of new shares to which

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that shareholder was entitled in accordance with the resolution, and appended thereto was a letter of renunciation by which the shareholder could renounce his right to the allotment and request the company to allot the new shares to his nominee. Letters of this description were received by the various applicants on this motion indicating that they were entitled to have allotted to them the number of shares contemplated by the resolution. The applicants other than Mr. Coulson did not desire the new shares, and they exercised their option of renunciation in favour of Mr. Coulson, and when he presented the letters of renunciation and applied to the company for the allotment of the shares to him he was met by the refusal of the managers to treat him as the person to whom the shares would be issued, and their defence is that under Article 32 the managers may "in their absolute discretion and without assigning any reason therefor refuse to register any transfer of shares of which they do not approve." In substance the contention on the part of the managers is this, that the letter of renunciation in such a case as this is a transfer of shares coming within the fasciculus of Articles—Nos. 30 to 38—dealing with the "Transfer and Transmission of Shares." The question is whether this renunciation was a transfer. I think it clearly was not. The fasciculus of articles relating to the transfer and transmission of shares deals with the shares of a registered holder, but this transaction is not a transfer of shares standing in the name of anyone. It is the substitution of a nominee in the place of the person to whom, in the first instance, the shares were proposed to be allotted, and in my opinion it does not come within Article 32, and the managers were wrong in thinking they could refuse to register Mr. Coulson in respect of these shares. The register must be rectified accordingly.

Solicitors for applicants: *Bell, Brodrick & Gray, for Harrison & Son, West Hartlepool.*

Solicitors for respondents: *Crossman, Block, Matthews & Crossman, for Turnbull & Tilly, West Hartlepool.*

R. M.

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[1915. J. 236.]

PETERSON J.

1919

Nov. 18, 19; *Dec.* 2.

Practice—Sale by the Court—Mistake—Reserve Price fixed by the Judge—Lower Price by Mistake in Chambers supplied to Auctioneer—Property knocked down to highest Bidder at Figure less than Reserve fixed by Judge—Refusal of Certificate allowing highest Bidder as Purchaser—Sale of Land by Auction Act, 1867 (30 & 31 *Vict. c.* 48), *s.* 7.

Sect. 7 of the Sale of Land by Auction Act, 1867, did not alter the existing practice by which the highest bidder became the purchaser on being declared or allowed to be the purchaser by the usual certificate. It merely enacts that the certificate allowing him to be the purchaser shall be given if he has bid up to the reserve price and there has been no fraud or improper conduct in the management of the sale. The certificate is still necessary for the purpose of converting the highest bidder into the accepted purchaser.

In re Longvale Brick and Lime Works, Ld. [1917] 1 I. R. 321 adopted on this point.

Upon a sale by the Court in a debenture holder's action, the judge fixed the reserve price at the sum of 8400*l.*, but by a mistake in the Master's chambers the sum of 4575*l.* was inserted as the reserve price in the sealed instructions furnished to the auctioneer who, acting thereon, knocked down the property at 5000*l.* to the highest bidder:—

Held, that inasmuch as the judge had only authorized the sale provided the reserve price fixed by him was obtained, and as the highest bid at the auction had not reached that figure but had only exceeded a lower reserve price which, by mistake, and in contravention of the direction of the judge in person, had been supplied to the auctioneer, there was nothing to compel the Court to certify the highest bidder to be the purchaser, and the certificate must be refused.

ADJOURNED SUMMONS.

The following statement of facts is taken from his Lordship's considered judgment: "The question on the present application is whether Mr. Procter is to be allowed the purchaser of the assets of the defendant company which were offered for sale on August 13, 1919. This is a debenture holder's action in which there was the usual judgment in 1915. In due course, an order was made for the sale of the assets which were included in the debentures. As the sale was to be by auction it was necessary to fix the reserves.

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In May, 1916, Mr. Feather, who is an estate agent and valuer, made an affidavit to which was exhibited a statement of the reserves which he proposed. These proposed reserves amounted to 4575*l.* and were contained in an exhibit marked B. Some of the persons interested were not satisfied with the reserves suggested by Mr. Feather and ultimately, after a considerable delay, an affidavit was made by Mr. Hanson in June, 1919. There was an exhibit to this affidavit containing the reserves which Mr. Hanson recommended amounting to 8400*l.* This exhibit was also marked B. On July 3, 1919, the Master fixed the scale for August 13, and his note contains this statement: 'I fix the reserves in accordance with Mr. Hanson's valuation (Exhibit B to his affidavit).' Some of the parties thought that Mr. Hanson's reserves were not sufficiently high and the question of the reserve was adjourned to the judge in chambers. On July 14 I intimated that if the dissatisfied parties were willing to pay for a revaluation by Mr. Hanson I might consider the question of a revaluation. On July 21 the question came before Eve J., and on an undertaking by the defendants to pay the costs relative to a revaluation by Mr. Hanson, and that he be instructed forthwith, the matter was adjourned for a week. On July 28 the fresh valuation had not been received and Eve J. ordered that the sale should proceed, and that if the fresh valuation gave higher figures, those should be adopted in fixing the reserves; but, if not, the present figures (that is Mr. Hanson's figures amounting to 8400*l.*) were to stand. On July 31 Eve J. directed that the sale should take place on August 13 in any event, but the reserves to be fixed should be given out to the plaintiff's solicitors on August 7; that if Mr. Hanson's fresh report be not received by August 7, the reserves were to be based on his existing report, and that the sale should proceed on those reserves unless the defendants were able upon Mr. Hanson's fresh report, if subsequently received, to obtain a valuation of the reserves in time to enable the new reserves to reach the auctioneer by post before the sale. Mr. Hanson was not in fact prepared to increase the reserves which he had already suggested; and consequently the reserves authorized

and ordered by Eve J. were the reserves amounting to 8400*l.* in Exhibit B to Mr. Hanson's affidavit. The papers with the Master's notes then went to the Vacation Master accompanied by this explanatory memorandum: 'Sale on August 13 inst. There is a dispute as to reserves, which has been to the judge (vide notes). A revaluation is to be made. This cannot be done before August 8. If the reserves are not increased they are to stand as sent herewith (see Master's note, July 3, 1919). If increased, the new ones would be adopted by the Vacation Master.' On August 7 the reserves were handed to the plaintiff's solicitors in a sealed envelope for transmission to the auctioneer. The auction took place on August 13, and in the course of the sale the auctioneer, who was Mr. Feather, opened the envelope. It then appeared that the reserves authorized by the document contained in the envelope were the reserves which had been suggested by Mr. Feather and not those which had been authorized by Eve J. Mr. Feather and Mr. Waterworth, the plaintiff's solicitor, who was present, recognized that there must have been some mistake, but Mr. Feather was advised that his only course was to proceed with the sale. He accordingly knocked down the property to Mr. Procter at 5000*l.*, that is, at 3400*l.* less than the reserve which had in fact been authorized by Eve J. It then appeared that the mistake had been occasioned by a slip on the part of a clerk in the Vacation Master's chambers who had seen the Master's note of July 3 that the authorized reserves were contained in an Exhibit B and had taken the Exhibit B to Mr. Feather's affidavit instead of Exhibit B to Mr. Hanson's affidavit. The result was that the reserves which the judge in person refused to sanction went to the auctioneer, and the property was knocked down for a sum which was 3400*l.* less than the sum which the judge had directed was the minimum sum for which the property was to be sold. When the facts were brought to the attention of the Master he declined to make the usual certificate allowing Mr. Procter as the purchaser. On September 1, 1919, an offer for the purchase of the property for 6000*l.* was received and embodied in a conditional contract.'

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The property in question consisted of freehold stone quarries with cranes, machinery and plant, and contiguous lands and premises comprising in all some 49,984 acres.

The matter now came before the Court upon a summons by the plaintiffs in the action asking that proceedings might be taken to certify the result of the sale or, alternatively, that directions might be given how to proceed in the matter. The summons was served upon the defendant company and Procter, the highest bidder at the auction.

Cunliffe K.C. and *Gurdon* for the plaintiffs. Until the certificate of the result of the sale has become binding neither side is bound and Procter had no enforceable contract. He is in no better position than if he had entered into a conditional contract subject to the approval of the Court.

It is well settled that there is no contract until confirmation by the Court: *Anonymous* (1); *Ex parte Minor* (2); *Twigg* v. *Fifield* (3); *M'Culloch* v. *Gregory* (4); *Lansdown* v. *Elderton* (5); Daniell's Chancery Practice, 8th ed., p. 951; Sugden's Vendors and Purchasers, 14th ed., p. 101. There is no difference in principle between biddings before a Master and before an auctioneer. *In re Thomas* (6) shows that when the confirmation has to be embodied in an order nothing is settled until the order is passed and entered.

There is no ground in this case for disturbing the practice of the Court and Procter ought not to have this sale confirmed. Moreover, the judge himself fixed the reserve price and the property has not been sold according to it. The Court always reserves to itself the right to say that the sale shall not be carried out.

Regarded as a question of specific performance, Procter ought not to be allowed to take advantage of a slip by an officer of the Court so detrimental to the plaintiffs.

Hughes K.C. and *D. D. Robertson* for Procter. Procter was the highest bidder at the auction, the property was

(1) (1794) 2 Ves. 335.
(2) (1805) 11 Ves. 559.
(3) (1807) 13 Ves. 517.
(4) (1854) 23 L. J. (Ch.) 656; 2 Eq. R. 1088.
(5) (1808) 14 Ves. 512.
(6) [1911] 2 Ch. 389.

knocked down to him, and we submit that this sale must stand.

Under a sale by the Court, the Court and all its officers are the agents of the vendor who is responsible for the mistake of his agents and cannot repudiate their contract. That contract is made as soon as the bidding is accepted: *Anson* v. *Towgood* (1); *Vesey* v. *Elwood*. (2) The auctioneer's authority is to sell and not merely to receive biddings, and the fall of the hammer is the acceptance by the agent of the Court of the bid. Although the certificate is important as proper evidence, it is not, we submit, necessary, and the sale is good unless fraud or the improper conduct of the sale can be shown. The Court is the agent of the parties and takes the management of the sale on their behalf, and when once the order for sale is made the Court becomes the compulsory agent of the parties.

[PETERSON J. That would mean that the Court, which has supreme powers, by its own order subjects itself to the position of an employee. That is directly contrary to all idea of agency. There is no contract of employment, no power on the part of any party to withdraw the agency of the Court, and no element of a contract of service.]

The question was discussed in *In re Banister* (3), where the Court held that the purchaser was not bound by a misleading condition settled by the conveyancing counsel who was regarded as the vendor's agent.

The Court whether as agent of the vendors or by reason of its jurisdiction can appoint an auctioneer to act as their agent with authority to sell: Daniell's Chancery Forms, 6th ed., form 1318, and the Master gave him authority to sell at 4575*l*. That is the auctioneer's authority and makes the contract binding. Procter had no notice that anything was wrong.

Under the old practice biddings were made in chambers before the Master and biddings were frequently reopened, but after the Court of Chancery Act, 1852 (15 & 16 Vict.

(1) (1820) 1 Jac. & W. 637. (2) (1842) 3 D. & War. 74.
(3) (1879) 12 Ch. D. 131.

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c. 80), biddings before the Master ceased and a sale by auction in chambers took place only with the consent of all parties: *Pemberton* v. *Barnes*. (1) And after the condemnation of the practice of reopening biddings by the House of Lords in *Barlow* v. *Osborne* (2), the Sale of Land by Auction Act, 1867 (30 & 31 Vict. c. 48), was passed. By s. 7 (3) of that Act two conditions must be fulfilled—namely, the highest bona fide bidder must have bid a sum equal to or higher than the reserved price and there must have been no fraud or improper conduct in the management of the sale. Subject to those conditions the making of the certificate allowing the purchaser becomes a purely formal matter: Fry on Specific Performance, 5th ed., p. 450, § 908. And the section regards the highest bidder as the purchaser unless and until he has been discharged. Here, fraud is out of the question and there has been no "improper conduct in the management of the sale" within the meaning of the section. James L.J. in *Griffiths* v. *Jones* (4) said that biddings could not be reopened except for fraud, and the cases show that unless there is something dishonest or tricky about the sale there is no improper conduct within the Act: *Delves* v. *Delves* (5);

(1) (1872) L. R. 13 Eq. 349.

(2) (1858) 6 H. L. C. 556.

(3) Sect. 7 provides: "And whereas it is the long settled practice of Courts of Equity in sales by auction of land under their authority to open biddings even more than once, and much inconvenience has arisen from such practice, and it is expedient that the Courts of Equity should no longer have the power to open biddings after sales by auction of land under their authority: Be it further enacted by the authority aforesaid, that the practice of opening the biddings on any sale by auction of land under or by virtue of any order of the High Court of Chancery shall, from and after the time appointed for the commencement of this Act, be discontinued, and the highest *bona fide* bidder at such sale, provided he shall have bid a sum equal to or higher than the reserved price (if any) shall be declared and allowed the purchaser, unless the Court or judge shall, on the ground of fraud or improper conduct in the management of the sale, upon the application of any person interested in the land (such application to be made to the Court or judge before the Chief Clerk's certificate of the result of the sale shall have become binding), either open the biddings, holding such bidder bound by his bidding, or discharge him from being the purchaser, and order the land to be resold upon such terms as to costs or otherwise as the Court or judge shall think fit."

(4) (1873) L. R. 15 Eq. 279, 281.

(5) (1875) L. R. 20 Eq. 77.

Brown v. *Oakshott* (1); and unless there is such an element the Court will not reopen the biddings: *In re Bartlett* (2); *In re Oriental Bank Corporation.* (3) Before the Act was passed Romilly M.R. said in *In re Carew's Estate* (4) that a sale could be reopened on the ground of fraud alone. Improper conduct cannot cover innocent mistake.

We submit that *In re Longvale Brick and Lime Works, Ld.* (5), in the Irish Court of Appeal was wrongly decided, but if not, that it can be distinguished from this case on the ground that the statement in the particulars in that case was wrong and directly affected the price to be given.

Although specific performance was refused in *Webster* v. *Cecil* (6) on the ground of the vendor's mistake in understating the price, such a mistake will not, since the Act of 1867, be a ground for opening the biddings: *Griffiths* v. *Jones* (7); Fry on Specific Performance, 5th ed., p. 377, § 759; and the highest bidder must be allowed the purchaser and ought not to be damnified by the mistake: per Jessel M.R. in *In re Arnold.* (8)

Dighton Pollock for the defendant company took no part in the argument.

Cunliffe K.C. in reply. The Court is not impotent to set this matter right. The plaintiffs are not asking for the biddings to be reopened under s. 7 of the Act of 1867, but are asking the Court to withhold the certificate and not complete a contract founded on the mistake of the Court's officer. The reserve price was not reached; there was in fact no reserve price to bring this case within the section because the reserve was that fixed by the judge and the biddings did not reach it. Sect. 7 contrasts "fraud" with "improper conduct," and if that section applies to this case, which I submit it does not, "improper conduct" would cover a case of mistake such as this: *In re Longvale Brick and Lime Works, Ld.* (5); and that decision also supports the proposition that the

(1) (1869) 38 L. J. (Ch.) 717.
(2) (1880) 16 Ch. D. 561.
(3) (1887) 56 L. T. 868.
(4) (1858) 26 Beav. 187.
(5) [1917] 1 I. R. 321.
(6) (1861) 30 Beav. 62.
(7) L. R. 15 Eq. 279, 281.
(8) (1880) 14 Ch. D. 270, 273.

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circumstances of this case are such that no Court would grant Procter specific performance of this contract.

Cur. adv. vult.

Dec. 2. PETERSON J. stated the facts set out above, and continued: The question now is whether Mr. Procter has a binding contract or ought to be allowed as the purchaser. If Mr. Procter is right in his contention, the express direction of the judge in person that the property was not to be sold for less than 8400*l.* can be overridden by a mistake made in chambers. Mr. Procter's counsel contended that the judge and the Master were agents for the parties to the action and that the parties were responsible for their agents' mistake and could not repudiate a sale which had been made at an undervalue by the mistake of their agents, and it was suggested that it was only as agent of the parties that the Court had power to order a sale, or give directions for the manner in which the sale was to be carried out. I am wholly unable to accept this view. An agent who has power to give orders to his principal in the matter of the agency and to fix, against his will, the price at which the principal's property shall be sold, is a novelty in the law of agency. The Court has jurisdiction, not because it is an agent of the parties, but because it is entrusted by the Sovereign with the duty of administering the law.

But the real argument in support of Mr. Procter's contention is based on s. 7 of the Sale of Land by Auction Act, 1867, 30 & 31 Vict. c. 48.

It is, I think, of some importance that the position of the highest bidder at an auction sale made under the direction of the Court should be remembered. He signs a bidding paper stating that he bid the sum set opposite to his name for and became the purchaser of, the lots specified in the particulars, and this with the certificate by the auctioneer that the result of the sale is truly set out in the bidding paper and that he has received the deposits mentioned in the schedule is transmitted to chambers. The Master then certifies that the property has been put up for sale and that the persons named in the

schedule to the certificate were the highest bidders for "and they are allowed by the judge to be the purchasers" of the respective lots set opposite to their names in the schedule at the prices mentioned in the schedule. There is thus no memorandum or contract of sale signed by the vendor as in the ordinary case of a sale by auction. As in the present case, the particulars and conditions intimate that the sale is by order of the Court, and that one of the Masters will certify the result of the sale, that the purchaser may attend to settle the certificate, that the certificate will then in due course be signed and filed and become binding. For many years this, or substantially this, has been the course adopted in sales by the Court. There is a series of decisions which establish that the purchaser was not entitled to the benefit of his purchase until the certificate of the result of the sale had become binding, but when the certificate became binding it related back to the date of the sale. See Daniell's Chancery Practice, 7th ed., 855; Sugden's Vendor and Purchasers, 13th ed., 79; *Anonymous* (1); *Ex parte Minor* (2); *Twigg* v. *Fifield* (3); *Anson* v. *Towgood* (4); *Vesey* v. *Elwood* (5); *M'Culloch* v. *Gregory*. (6) The certificate recognized, allowed or approved of the highest bidder as the purchaser, and it was the certificate which enabled the highest bidder to say that he was the purchaser and entitled to the benefit of his purchase. Taking advantage of the fact that the highest bidder did not become the purchaser before the certificate was binding the Court of Chancery was in the habit of opening the biddings where a higher bid was obtained after the sale, so that the highest bidder at the auction was always exposed to the risk that the property might be sold to some other person who subsequently offered a better price. In order to meet the inconvenience of that practice, s. 7 of the Sale of Land by Auction Act, 1867, was passed. [His Lordship read the section, and continued:] By this section the continuation of the practice to which I have referred

(1) 2 Ves. 335.
(2) 11 Ves. 559.
(3) 13 Ves. 517.
(4) 1 Jac. & W. 637.
(5) 3 D. & War. 74.
(6) 23 L. J. (Ch.) 656; 2 Eq. R. 1088.

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was prohibited and it was enacted that the highest bidder should be "declared and allowed the purchaser" (1.) if he had bid up to or above the reserve price and (2.) if there was no fraud or improper conduct in the management of the sale established on an application made to the Court before the Chief Clerk's certificate of the result of the sale had become binding. It is to be observed that the section does not alter the existing practice by which the highest bidder becomes the purchaser on being declared or allowed to be the purchaser by the usual certificate. It merely enacts that the certificate allowing him to be the purchaser shall be given if he has bid up to the reserve price and there has been no fraud or improper conduct in the management of the sale. The certificate is still necessary for the purpose of converting the highest bidder into the accepted purchaser. See *In re Longvale Brick and Lime Works, Ld.* (1)

Three points have been taken by the plaintiffs against the present sale. First, that the reserve price was not reached; secondly, that there was improper conduct in the management of the sale; and, thirdly, that it is open to the Court to refuse to allow the highest bidder to be the purchaser in cases where the Court would not enforce the contract for reasons outside of the contingencies contemplated by the section. In this case there was no fraud but it is said that the mistake as to the reserve was improper conduct in the management of the sale. In *Griffiths* v. *Jones* (2) James L.J. stated that biddings cannot now be opened except for fraud, but this does not seem to take into account the fact that s. 7 gives both "fraud" and "improper conduct in the management of the sale" as grounds for opening the biddings. In *Brown* v. *Oakshott* (3) Lord Romilly M.R. said that the section meant only to provide for the case of grossly improper conduct, while in *Delves* v. *Delves* (4), Malins V. C. expressed the view that "improper conduct" means something which although not fraudulent borders on fraud. Those cases were criticised by the Irish Court of Appeal in *In re Longvale Brick and Lime*

(1) [1917] 1 I. R. 321, 329.
(2) L. R. 15 Eq. 279.
(3) 38 L. J. (Ch.) 717.
(4) L. R. 20 Eq. 77.

Works, Ld. (1), where the Lord Chancellor was of opinion that a gross mistake by the auctioneer was "improper conduct in the management of the sale." In the view which I take of this case, I do not consider that it is necessary for me to express an opinion on this contention. Nor is it necessary for me to come to a conclusion on the question whether it is open to the Court to refuse to approve the highest bidder as purchaser on the ground that the case is one in which the circumstances are such as would render an ordinary contract unenforceable. This is the view which was taken by the Irish Court of Appeal in *In re Longvale Brick and Lime Works, Ld.* (1)

It is difficult to suppose that where, owing to a mistake, the sale had been conducted in direct contravention of the order of the judge or where it was discovered that the highest bidder was an undischarged bankrupt, the Court would be compelled by this Act to accept the highest bidder as the purchaser. There is much to be said for the view that the Act only affects the powers of the Court to open biddings on the ground of undervalue and that other objections to the sale are not touched. See *Woods* v. *Brown* (2) and *In re Longvale Brick and Lime Works, Ld.* (1) But I do not think it necessary to base my decision on this ground, for in my view Mr. Procter did not bid up to the reserve price. The reserve price was the price which the judge fixed as the lowest price at which the property was to be sold and not the price which by mistake and in contravention of the direction of the judge in person was supplied to the auctioneer. The judge authorized the sale of the property provided the sum of 8400*l.* was obtained, and as the minimum which he fixed as the reserve was not reached, there is nothing to compel the Court to certify the highest bidder to be the purchaser. This is not a case in which a mistake has been made by a vendor or his agent. The mistake was made by an officer of the Court. I should be sorry to think that the Court was, owing to a mistake by one of its officers, bound to give effect to a sale in such circumstances and to deprive the persons interested of their

(1) [1917] 1 I. R. 321. (2) [1915] 1 I. R. 29.

PETERSON J. 1919 JOSEPH CLAYTON, LD., *In re.* SMITH *v.* THE COMPANY.

property at far less than the price which after careful consideration the judge had determined was the lowest which should be accepted. I am, therefore, of opinion that Mr. Procter ought not to be allowed as the purchaser.

Solicitors for plaintiffs: *Peacock & Goddard, for Waterworth & Laycock, Keighley.*

Solicitors for respondent Procter: *Bell, Brodrick & Gray, for F. Scatchard, Bradford.*

Solicitors for defendant company: *Long & Gardiner, for Browning & Oliver, Bradford.*

R. M.

RUSSELL J. 1919 Dec. 5, 19.

In re MÜNSTER (ENEMY).

[1914. M. 3191.]

War—Emergency Legislation—Enemy Property vested in Custodian—Revenue—Super-tax—Finance (1909–10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *ss.* 66, 72—*Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 41—*Trading with the Enemy Amendment Act*, 1914 (5 *Geo.* 5, *c.* 12), *Preamble*, *s.* 5.

Considered. VAMVAKAS *v.* CUSTODIAN [1952] 2 Q.B. 183

Property belonging to an enemy which is paid to or vested in the custodian under the Trading with the Enemy Amendment Act, 1914, is, pending its disposition by Order in Council after the termination of the war, removed from the control and beneficial ownership of the enemy. During the interval the beneficial ownership is in statutory suspense or abeyance, the custodian having meanwhile limited powers of dealing with the property.

When war broke out in 1914, M., an enemy within the Act, owned real estate in England and shares and securities in British companies. By orders under s. 4 of the Act the real estate, shares and securities were vested in the custodian. The Special Commissioners for Income Tax assessed the custodian to super-tax as agent or receiver for M. The custodian disputed the legality of the assessment:—

Held, that, M.'s beneficial ownership of the property having ceased on the making of the vesting orders, the profits and gains received by the custodian were received by him in respect of M., but did not in his hands belong to M.; that he did not receive or hold them as agent or receiver or trustee for M. within s. 41 of the Income Tax Act, 1842; and, therefore, that he was not liable to be assessed to super-tax.

But *held*, that, as M. could not, after the war, ask to receive back the property except on the footing that a sum equal to the amount of super-tax which, but for the war, he would have been liable to pay was paid, the custodian must, under the discretion given to the Court by sub-s. 1 of s. 5 of the Act of 1914, pay that sum (the amount to be

agreed) to the Commissioners as analogous to payment of a debt under sub-s. 2.

ADJOURNED SUMMONS.

Alexander Prince Münster of Derneberg was an enemy within the Trading with the Enemy Amendment Act, 1914. At the outbreak of war between England and Germany on August 4, 1914, he was the owner of a large estate in Sussex known as the Maresfield estate. He was also the owner of various shares and securities in British companies. The total income produced from the estate and the shares and securities amounted to about 4000*l.* or 5000*l.* per annum.

By an order of May 10, 1915, the Maresfield estate was vested in the Public Trustee as custodian, under s. 4 of the Act, for all the estate and interest therein then vested in Prince Münster. By another order of July 4, 1916, the shares and securities were similarly vested in the custodian.

In July, 1918, the Special Commissioners of Income Tax required the Public Trustee to make returns for super-tax (1)

(1) Super-tax was first imposed by the Finance (1909–10) Act, 1910.

Sect. 66: "(1.) In addition to the income tax charged at the rate of one shilling and two pence under this Act, there shall be charged, levied, and paid for the year beginning on the sixth day of April, nineteen hundred and nine, in respect of the income of any individual, the total of which from all sources exceeds five thousand pounds, an additional duty of income tax (in this Act referred to as a super-tax) at the rate of six pence for every pound of the amount by which the total income exceeds three thousand pounds.

"(2.) For the purposes of the super-tax, the total income of any individual from all sources shall be taken to be the total income from all sources for the previous year . . . ."

Sect. 72: "(1.) The super-tax shall be assessed and charged by the Commissioners for the special purposes of the Acts relating to income tax (in this Act referred to as the Special Commissioners).

"(2.) Every person upon whom notice is served in manner prescribed by regulations under this section by the Special Commissioners requiring him to make a return of his total income from all sources or, in the case of a notice served upon any person who is chargeable with or liable to be assessed to income tax under section forty-one of the Income Tax Act, 1842, shall . . . . make such a return in the form and within the time required by the notice."

"(6.) All provisions of the Income Tax Acts relating to persons who are to be chargeable with duty, assessments, and appeals against those assessments, ... shall, so far as they are applicable, apply to the charge, assessment, ... of duty under this section, ..."

Super-tax was made applicable to incomes over 3000*l.* by the Finance Act, 1914, and to incomes over 2500*l.* by the Finance Act, 1918.

RUSSELL J. 1919 MÜNSTER (Enemy), *In re.*

for the four years 1915–16, 1916–17, 1917–18, and 1918–19 as agent or receiver for Prince Münster. The Public Trustee declined to do so. In March, 1919, they assessed him to super-tax for each of the four years in question as agent or receiver for Prince Münster, and notices of assessment were served upon the Public Trustee. He disputed both the legality of the assessments and the amounts at which the assessments were made.

On July 4, 1919, the Public Trustee issued a summons under the Act of 1914 asking for liberty to appeal against the assessments, both as to their legality and their amounts. When the summons came before Younger J. he gave directions for it to be amended, and for the Commissioners of Inland Revenue to be joined as respondents. This was done, and the Commissioners now appeared and submitted to the jurisdiction.

The summons as amended asked for directions whether the custodian was liable to make a return to super-tax as agent or receiver of Prince Münster for the four years in question.

Sir Ernest Pollock S.-G. and *Austen-Cartmell* for the custodian. Two questions arise: Is the custodian the agent or receiver of Prince Münster? Did Prince Münster, after the vesting orders, retain any right or interest in the property? The custodian, if he is liable at all, agrees that Prince Münster's income comes within the super-tax provisions. (1) The question depends on what is the effect of a vesting order under the Trading with the Enemy Amendment Act, 1914. (2) The preamble shows the object of the Act,

(1) See footnote on p. 269.

(2) The preamble of the Trading with the Enemy Amendment Act, 1914, recites that it is expedient to make further provision for preventing the payment of money to enemies and "for preserving, with a view to arrangements to be made at the conclusion of peace, such money and certain other property belonging to enemies."

Sect. 1: "(1.) The Board of Trade shall appoint a person to act as custodian of enemy property . . . ., for the purpose of receiving, holding, preserving, and dealing with such property as may be paid to or vested in him in pursuance of this Act. . . . ."

Sect. 4: "(1.) The High Court or a judge thereof may, on the application of any person who appears to the Court to be a creditor of an

which is to preserve enemy property with a view to arrangements to be made at the conclusion of peace. Sect. 5, sub-s. 1, is the crucial section ; under it the custodian is to hold money paid to and property vesting in him under the Act until the termination of the war, and "shall thereafter deal with the same in such manner as His Majesty may by Order in Council direct." The custodian is not a trustee for the enemy; s. 5 absolutely destroys all interest of the enemy in the property. The enemy's whole interest is vested in the custodian; nothing in s. 4 contradicts this. All that is left in the enemy is a spes restitutionis, nothing else : *In re Fried. Krupp Aktiengesellschaft.* (1) The language of the Act is different as to enemy property before and after vesting—

enemy . . . ., or to be interested in any property, real or personal . . . ., belonging to or held or managed for or on behalf of an enemy, or on the application of the Custodian . . . ., by order vest in the Custodian any such real or personal property . . . . and . . . . confer on the Custodian such powers of selling, managing and otherwise dealing with the property as to the Court or judge may seem proper."

"(3.) A vesting order under this section as respects property of any description shall be of the like import and effect as a vesting order as respects property of the same description under the Trustee Act, 1893."

Sect. 5: "(1.) The Custodian shall, except so far as the Board of Trade or the High Court or a judge thereof may otherwise direct, and subject to the provisions of the next succeeding sub-section, hold any money paid to and any property vested in him under this Act until the termination of the present war, and shall thereafter deal with the same in such manner as His Majesty may by Order in Council direct.

"(2.) The property held by the Custodian under this Act shall not be liable to be attached or otherwise taken in execution, but the Custodian may, if so authorised by an order of the High Court or a judge by whose order any property belonging to an enemy was vested in the Custodian under this Act, or of any Court in which judgment has been recovered against an enemy, pay out of the property paid to him in respect of that enemy the whole or any part of any debts due by that enemy and specified in the order: Provided that before paying any such debt the Custodian shall take into consideration the sufficiency of the property paid to or vested in him in respect of the enemy in question to satisfy that debt and any other claims against that enemy of which notice verified by statutory declaration may have been served upon him.

"(3.) The receipt of the Custodian or any person duly authorized to sign receipts on his behalf for any sum paid to him under this Act shall be a good discharge to the person paying the same as against the person or body of persons in respect of whom the sum was paid to the Custodian."

(1) [1916] 2 Ch. 194.

RUSSELL J. 1919 MÜNSTER (Enemy), *In re.*

before, it is "property belonging to or held or managed for or on behalf of an enemy," s. 4, sub-s. 1; after, it is "property paid to or vested in the custodian in respect of the enemy," s. 5, sub-s. 2. The custodian deals with the property, lets it, etc., without any reference to the enemy. If the custodian is agent for the enemy and the beneficial ownership does not completely vest in the custodian, no doubt liability to super-tax would in some way be on the non-resident owner.

[RUSSELL J. Will it assist to look at the statutory provisions relating to agents and receivers in the Income Tax Act, 1842? (1)]

The custodian is not a receiver appointed by the Court within s. 43. If his argument on s. 5 of the Act of 1914 is right, the Act of 1842 does not matter.

The Treaty of Peace Order, 1919 (Statutory Rules and Orders, 1919, No. 1517), s. 1, sub-s. xvi., does not apply to this property.

[RUSSELL J. That view would take away an enormous amount of property from the operation of the Order.]

It does not apply because this is not property belonging to a German national at the date of the Treaty of Peace. Sub-s. xvii. does not contravene this view. The Order is

(1) Income Tax Act, 1842, s. 41: "And be it enacted, that the trustee, guardian, tutor, curator, or committee of any person, being an infant, or married woman, lunatic, idiot, or insane, and having the direction, control, or management of the property or concern of such infant, married woman, lunatic, idiot, or insane person, whether such infant, married woman, lunatic, idiot, or insane person shall reside in Great Britain or not, shall be chargeable to the said duties in like manner and to the same amount as would be charged if such infant were of full age, or such married woman were sole, or such lunatic, idiot, or insane person were capable of acting for himself; and any person not resident in Great Britain, whether a subject of Her Majesty or not, shall be chargeable in the name of such trustee, guardian, tutor, curator, or committee, or of any factor, agent, or receiver, having the receipt of any profits or gains arising as herein mentioned, and belonging to such person, in the like manner and to the like amount as would be charged if such person were resident in Great Britain, and in the actual receipt thereof; and every such trustee, guardian, tutor, curator, committee, agent, or receiver shall be answerable for the doing of all such acts, matters, and things as shall be required to be done by virtue of this Act in order to the assessing of any such person to the duties granted by this Act, and paying the same."

really irrelevant, because it speaks of property of German nationals, whereas the question is here, under s. 5 of the Act of 1914, whether this is or is not the property of a German national. The use of sub-s. xvi. depends on the question whether the property is that of a German national. The definition of German national in s. 2 of the Order is wider in terms than that of enemy subject in the Trading with the Enemy Amendment Act, 1916, s. 15.

Sir Gordon Hewart A.-G., *Sheldon*, *T. H. Parr*, and *R. P. Hills* for the Commissioners. This is not really a proceeding to determine liability to income tax but is one for the construction of the Act of 1914. Is the custodian a trustee or agent having receipt of profits and gains within s. 41 of the Act of 1842 ? By the Act of 1914 enemy property is either paid to the custodian under s. 2 or is vested in him under s. 4. The phrases " property belonging to the enemy " and " property held by the custodian in respect of the enemy " are reiterated. But that is not to say that the property does not remain the enemy's property after vesting in the custodian as much as it was before vesting. Up to payment or vesting the property is the enemy's ; after vesting it is still the enemy's, but with the hand of the custodian upon it—for the purpose of preserving it till His Majesty shall direct what shall be done with it after the termination of the war : *In re Ling and Duhr.* (1) In *Daimler Co.* v. *Continental Tyre and Rubber Co.* (2), Lord Parker of Waddington says that subject to any legislation or anything in the peace terms to the contrary enemy property in this country " will," not " may," be restored to its owners after the war ; and in *Tingley* v. *Müller* (3) Lord Cozens-Hardy M.R. says the weight attributable to Lord Parker's observations " is greatly increased by the circumstance that Lord Parker's judgment was formally approved of and concurred in by Lord Mersey, Lord Kinnear, and Lord Sumner." In *Hugh Stevenson & Sons* v. *Aktiengesellschaft für Cartonnagen Industrie* (4) Lord Finlay says that it is not the law of this country that the

(1) [1918] 2 Ch. 298.
(2) [1916] 2 A. C. 307, 347.
(3) [1917] 2 Ch. 144, 158.
(4) [1918] A. C. 239, 244.

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property of enemy subjects is confiscated, and that when peace is restored he is considered as entitled to it with any fruits it may have borne. In the same case (1) Lord Haldane says that the law of this country does not in general confiscate the property of an enemy, his right to it during war is not extinguished but merely suspended.

[RUSSELL J. Was the effect of a vesting order being dealt with ?]

No. Again, in *Fried. Krupp Aktiengesellschaft* v. *Orconera Iron Ore Co.* (2) Lord Birkenhead L.C. says: "It is a familiar principle of English law that the outbreak of war effects no confiscation or forfeiture of enemy property." These are, if not judgments, at least dicta of the highest authority that enemy property is not confiscated. Property vested in or paid to the custodian remains the enemy's property. But there is a suspension while war lasts. It will be returned to him at the peace unless something is ordered to the contrary. That is the general principle. If the Act of 1914 had meant to confiscate an enemy's property it would have distinctly said so. It has not done so. It merely puts the property in the hands of a custodian. It vests it in him not as owner but as custodian, to preserve it as the preamble to the Act says to await the end of the war —for it then, unless something to the contrary is done, to be restored to the enemy or to be dealt with as His Majesty shall direct. A custodian is in charge, he protects it, when peace comes he deals with it as directed—meanwhile, it is the enemy's. No one has ever found in the Act anything to divest the enemy's beneficial ownership. Unless something is done to divest it hereafter the property will be restored to the enemy at the end of the war. At present nothing has been or is being done. Till something is done the property remains the enemy's and the custodian holds it in medio. One of the purposes of his appointment is to pay debts. It may be said that if the property is to be restored to the enemy the super-tax can be recovered from him when it is restored. But there is the time limit of

(1) [1919] A. C. 247. (2) (1919) 88 L. J. (Ch.) 304, 309.

three years imposed by s. 72 of the Finance (1909–10) Act, 1910. The beneficial ownership must be in some one.

[RUSSELL J. May it not be in the air ?]

The custodian is within s. 41 of the Act of 1842 as "agent," or at any rate as "receiver," of Prince Münster. If it could be said that the custodian was a receiver appointed by the Court within s. 43 there is no doubt he would be liable. But that cannot be said.

[RUSSELL J. He is in a very different position from a receiver appointed by the Court in a mortgagee's action. And he is not a caretaker. He is more like being owner.]

The Treaty of Peace Order, 1919, is not yet in force, so may strictly be disregarded. But, if it may be taken as an indication of what will ultimately be done, a debt due to the revenue will have precedence.

Shortly, the Act of 1914 is not primarily an Act for the benefit of creditors, though it is an Act in their interest ; it preserves enemy property, preserving its identity as enemy property ; some debts are being paid out of it, but the reason of not using property in the custodian's hands for payment of debts and liabilities generally is the difficulty of doing so ; but the revenue is in a different position from any ordinary creditor.

Austen-Cartmell in reply. It would astonish the framers of the Act of 1914 to be told that there is any property left in the enemy. It is taken away from him for all purposes and can only be dealt with under the Act. The Crown seems doubtful whether to come in under or against the Act. It is an untenable position that the custodian can be assessed as trustee for the enemy, "as agent or receiver," as if any property were left remaining in the enemy. But if, by any other means, on a proper application being made, the money can be obtained from the custodian as a just debt under sub-s. 2 of s. 5, he does not mind the revenue having it. But he objects to it being got from him as if the property were the enemy's.

The cases cited on the other side deal mainly with the position under the common law and not under the Act of

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1914. It is now the common law that the State does not confiscate enemy private property. Under the Act the beneficial ownership is held in statutory suspense for whomsoever it may ultimately concern; in the meantime there is no one who can say he is beneficial owner. *In re Ling and Duhr* (1) is the first reported case in which the great "central fund" which is at the Peace to be a weapon in the hands of the Government is spoken of. The *Orconera Case* (2) is quite outside the Trading with the Enemy Acts, and would have been decided in the same way if those Acts had never been enacted. So also *Hugh Stevenson & Sons* v. *Aktiengesellschaft für Cartonnagen Industrie.* (3) Here the Court has to deal solely with emergency legislation and not with the common law.

Cur. adv. vult.

Dec. 19. RUSSELL J. after stating the facts as above and reading the provisions contained in the Finance (1909–10) Act, 1910, s. 66 (1.), (2.), s. 72 (1.), (2.), (6.), so far as material. (4) In order to see whether the custodian is a person chargeable I must refer to s. 41 of the Income Tax Act, 1842. (5) That section is in the following terms. [His Lordship read them and continued:] Under that section two questions have to be considered: first, does the custodian receive the profits or gains in question as agent or receiver for Prince Münster? secondly, do the profits and gains in question belong to Prince Münster? In order to answer these questions it is necessary to consider the relevant sections of the Act of 1914 (6) with a view to seeing what is the position thereunder of the custodian and whether there remains in the enemy any beneficial interest in such property as has been paid to or vested in the custodian under the Act.

The preamble of the Act recites the expediency of making further provision for preserving property belonging to enemies "with a view to arrangements to be made at the conclusion

(1) [1918] 2 Ch. 298.
(2) 88 L. J. (Ch.) 304.
(3) [1918] A. C. 239.
(4) See footnote on p. 269.
(5) See footnote on p. 272.
(6) See footnote on p. 270.

of peace." Sect. 1 provides for the appointment of the custodian "for the purpose of receiving, holding, preserving, and dealing with such" enemy "property as may be paid to or vested in him in pursuance" of the Act. Sect. 4, sub-s. 1, enables the Court to vest real or personal property belonging to an enemy in the custodian and to confer upon the custodian such powers of selling, managing, or otherwise dealing with the property as may seem proper. Sub-s. 3 deals with the purport and effect of the vesting order by reference to the Trustee Act, 1893. I would point out that so far the Act has dealt with the property as at the time before or when the vesting order is made, and it correctly describes the property (in the preamble and in s. 4) as "property belonging to enemies" or "property belonging to an enemy." Next comes s. 5, which deals with the property after it has become vested in the custodian, and it will be observed that the property is no longer so described, except in one instance, where the reference is to the making of a vesting order. Sect. 5 is in these terms. [His Lordship read sub-ss. 1, 2 and 3, and continued:] Sub-s. 2 has been amended but the amendment is not material to the question which I have to decide. I would point out that it makes ample provision for the satisfaction of an enemy's debts out of the property paid to the custodian in respect of that enemy. Sub-s. 1 is obligatory and not permissive. Subject to the widest possible discretion vested in the Board of Trade or the Court, and subject to the provisions of sub-s. 2, the custodian is bound to hold the property vested in him under the Act until the termination of the war; and after the termination of the war he is bound to deal with the property in such manner as His Majesty may by Order in Council direct. In sub-ss. 2 and 3 both property paid to the custodian and property vested in him under the Act are treated no longer as property belonging to the enemy but as property paid to or vested in the custodian "in respect of the enemy."

The phraseology used in the preamble and in s. 5 establishes in my judgment that, pending its disposition by Order in Council after the determination of the war, the property

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is removed from the control and from the beneficial ownership of the enemy. At the termination of the war fresh considerations will arise; and whether the enemy will recover, and to what extent he will recover, the beneficial ownership will depend upon the arrangements made at the conclusion of Peace (referred to in the preamble) and upon the terms of any Order in Council, made, I doubt not, with those arrangements in view, under s. 5.

To this reading of the Act two objections have been raised in argument on behalf of the Commissioners of Inland Revenue. First, it is said that this is confiscation, and it is further said that confiscation of the property of enemy subjects is not the law of this country. For this latter proposition various statements from different judgments were cited. Two will serve as examples. In *Hugh Stevenson & Sons* v. *Aktiengesellschaft für Cartonnagen Industrie* (1) Lord Finlay L.C. says, "It is not the law of this country that the property of enemy subjects is confiscated. Until the restoration of peace the enemy can, of course, make no claim to have it delivered up to him, but when peace is restored he is considered as entitled to his property with any fruits which it may have borne in the meantime." Lord Haldane in the same case remarks: "The law of this country does not in general confiscate the property of an enemy. He cannot claim to receive it during war, but his right to his property is not extinguished; it is merely suspended." The passages no doubt accurately state the law of this country apart from the provisions of any statute or of the treaty of peace. Lord Parker in *Daimler Co.* v. *Continental Tyre and Rubber Co.* (2) makes this clear when he says: "Subject to any legislation to the contrary or anything to the contrary contained in the treaty of peace when peace comes, enemy property in this country will be restored to its owners after the war just as property in enemy countries belonging to His Majesty's subjects will or ought to be restored to them after the war." In my judgment the Act of 1914 does not depart from these

(1) [1918] A. C. 239, 244, 247. (2) [1916] 2 A. C. 307, 347.

principles or involve confiscation. Under its provisions the enemy is deprived of beneficial ownership during the war, and the custodian after the termination of the war is bound to deal with it in such manner as His Majesty (keeping no doubt in view the arrangements made at the conclusion of peace) may by Order in Council direct.

The second objection urged against this view of the Act of 1914 is that it involves the existence of a period of time during which there is no beneficial owner of the property and that this state of affairs is contrary to ordinary legal conceptions and principles. That is quite true, but it is the result of a statute which, in my judgment, causes the beneficial ownership to be and remain in statutory suspense or abeyance during the period in question, during which period the custodian has certain limited powers of dealing with the property.

It was suggested that, unless some beneficial interest in the property remain vested in the enemy, the opening words of sub-s. 2 of s. 5 of the Act of 1914 were unnecessary. They may, however, have been put in the sub-section to prevent any implication being raised in favour of a creditor by reason of the controlled power thereby reserved to the custodian of paying the debts of an enemy out of the property in the hands of the custodian in respect of that enemy.

An argument was also addressed to me founded upon the Treaty of Peace Order, 1919, but, as the Attorney-General pointed out, that Order is not yet in force, and may, for the purposes of this case, be disregarded.

In the result I come to the conclusion that the profits and gains in question have only been received by the custodian in respect of Prince Münster, that they do not in the hands of the custodian belong to the Prince, and, accordingly, that the custodian has not received those profits and gains, and does not hold them in any sense as an agent or receiver or trustee for Prince Münster.

In answer to the summons I declare that the custodian is not liable to make a return to super-tax, nor is he liable

RUSSELL J. 1919 MÜNSTER (Enemy), *In re.*

to be assessed to super-tax, as agent or receiver for Prince Münster in respect of the four years in question.

But this does not quite dispose of the matter. It is clear that a sum equal to the amount of super-tax for the four years in question which Prince Münster but, for the war, would have been liable to pay in respect of these profits and gains ought to be paid to the Commissioners of Inland Revenue, because, in my view, Prince Münster could never properly ask to receive back the property except upon the footing that this sum is paid. In all material respects, making provision for this sum appears to me analogous to the provision made by sub-s. 2 of s. 5 of the Act of 1914 for payment of an enemy's debts out of the property paid to the custodian in respect of that enemy. It seems to me accordingly that this is a case in which I may properly exercise the wide discretion vested in me by sub-s. 1 of s. 5 of the Act of 1914, and I direct the custodian, out of the money and property paid to and vested in him in respect of Prince Münster, to pay to the Commissioners of Inland Revenue whatever sum may be agreed between them as the amount of super-tax for the four years in question which Prince Münster, but for the war, would have been liable to pay.

Solicitors: *Coward & Hawksley, Sons & Chance; Solicitor of Inland Revenue.*

A. L.

PETERSON J.
1919
Oct. 24.

In re DOTT'S LEASE.
MILLER *v.* DOTT.

[1919. D. 585.]

Lease—Theatre—Covenant by Lessee to maintain Prices of Admission "as now charged"—Increase of Prices—Breach.

Under a covenant by the lessee of a theatre that he would at all times during the term "maintain" the prices of admission "as now charged" at the theatre, and would not reduce the same without the consent in writing of the lessor first obtained:—

Held, that the covenant only restricted a decrease and did not restrain an increase in the prices of admission.

ADJOURNED SUMMONS.

The plaintiff Miller was the lessee of the Garrick Theatre under a lease dated December 28, 1917, for fourteen years, less one day, from April 13, 1917. The lease contained among other covenants by the lessee a covenant that "the said theatre shall at all times during the said term be kept and used as a first class London theatre only," and also a covenant that "the lessee will at all times during the said term maintain the prices of admission as now charged at the said theatre and will not reduce the same without the consent in writing of the lessor first obtained." By an underlease dated February 11, 1918, the plaintiff Miller demised the premises to his co-plaintiff Cochran for the term of the lease less the last six days thereof.

The prices of admission charged at the theatre at the date of the lease were continued until March 28, 1919, when owing to the enormous increase in the cost of theatrical productions, due to the war, the plaintiff Cochran raised some of the prices of admission. Notwithstanding this increase in price the evidence was that every seat in the theatre was sold for every performance.

The defendant, the lessor, objected to the increase of price, and on April 29, 1919, served a notice of the breach of covenant on the plaintiff Miller under s. 14 of the Conveyancing Act, 1881, requiring the same to be remedied.

PETERSON J. 1919 DOTT'S LEASE, *In re.* MILLER *v.* DOTT.

The plaintiffs then took out this summons for a declaration that it was no breach of covenant by the lessee for the prices of admission as charged at the date of the lease to be raised without the consent of the defendant, and that the plaintiffs were entitled to raise the same without such consent.

Wilfrid Hunt for the plaintiffs. The covenant to maintain prices does not prohibit an increase in them. To "maintain" according to the Oxford English Dictionary means to "keep up." A covenant to maintain a railway includes and authorizes an improvement in it: *Sevenoaks, Maidstone and Tunbridge Ry. Co.* v. *London, Chatham and Dover Ry. Co.* (1) A man may maintain a thing either by keeping it in the same state or condition or by improving it. It would make this covenant insensible to construe the earlier part of it as meaning that the lessee must neither increase nor reduce the prices of admission, and then go on to say that he must not reduce them without the lessor's consent. The plaintiffs have not committed any breach of covenant.

Sir A. L. Briscoe for the defendant. The covenant must be interpreted literally, and means to maintain the prices as now charged, that is, in the present condition as at the time when the lease was granted. It amounts to this—that on no consideration shall the prices of admission be increased, but that if the lessee can make out a good case for reduction the lessor may allow it. Webster's Dictionary illustrates the meaning of "maintain" by the instance "to maintain a certain heat in a furnace," that is, to keep it at a certain temperature without variation. In the present case it might be safe to allow a reduction, but an increase in the prices might injure the lessor by driving away old customers. There is a statutory obligation to maintain a railway which has no analogy to this case.

PETERSON J. This is a short point of construction arising on a lease of the Garrick Theatre. The lessor granted a lease of the theatre on December 28, 1917, for fourteen years, containing various covenants by the lessee, and amongst them

(1) (1879) 11 Ch. D. 625.

were these two covenants—"that the said theatre shall at all times during the said term be kept and used as a first class London theatre only," and also "that the lessee will at all times during the said term maintain the prices of admission as now charged at the said theatre and will not reduce the same without the consent in writing of the lessor first obtained." The question is whether the latter covenant prohibits the lessee from raising the prices of admission. This involves the question whether the phrase "to maintain the prices of admission as now charged" means "to maintain them at the same level without alteration," that is, whether it is the affirmative of the two negatives—not to increase and not to decrease. In the course of the argument it was pointed out that it would be an odd result that while the earlier part of the covenant prohibited any increase or decrease, the latter part prohibited any decrease without the consent in writing of the lessor. The real question turns upon the use of the word "maintain." I do not think that the true meaning is that the prices are to be kept at the same level as the prices existing at the date when the lease was granted. The words are "maintain the prices of admission as now charged at the said theatre," and not "the prices of admission at the said theatre as now charged." In the Oxford English Dictionary the meaning of "maintain" is given as "to keep up," "to keep (stock) from decline in price." In my view, and especially having regard to the immediately preceding covenant that the theatre should be kept and used as a first class London theatre only, the true meaning of the second covenant is that the lessee will at all times during the term keep up, or keep from declining, the prices of admission that are now charged at the theatre, and will not reduce the same without the consent in writing of the lessor first obtained.

In my opinion the covenant in question only restricts a decrease, and does not restrain an increase, in the prices of admission. There will be a declaration accordingly.

Solicitors for the plaintiffs: *J. D. Langton & Passmore.*
Solicitors for the defendant: *Baker & Savigny.*

R. M.

Applied. *Re* OPPENHEIM'S WILL TRUSTS. [1950] 2 All E.R. 86.

Followed. *In r* OPPENHEIM [1950] Ch. 633

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In re MARSHALL.
MARSHALL *v.* WHATELEY.

[1919. M. 1974.]

Will—Protected Life Interest—"Until he shall assign or charge or affect to assign or charge"—Tenant for Life a Lunatic not so found—Receiver in Lunacy—Subsequent Charge by Tenant for Life—Forfeiture—Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), *ss.* 116, 120.

By his will dated February 14, 1912, a testator, who died in 1913, gave his residuary real and personal estate to trustees upon trust to raise a fund of 6000*l.* and to hold the same upon trust to pay the income to his son during his life or "until he . . . . shall assign or charge or affect to assign or charge the said income or some part thereof or until any other event shall happen whereby if the income belonged absolutely to him he would be . . . . deprived of the personal enjoyment thereof." On December 12, 1916, an order was made in lunacy appointing a receiver of the son's estate under s. 116, sub-s. 1 (*d*), of the Lunacy Act, 1890, the whole of his income being allowed for his maintenance. On May 15, 1919, the son executed an equitable charge on his income under the testator's will:—

Held, that the order in lunacy appointing a receiver did not operate as a forfeiture because the receiver was the statutory agent of the son to receive the income of the trust fund; and that, as the document of May 15, 1919, was executed after the appointment of the receiver in lunacy, it was null and void, and could not therefore work a forfeiture.

In re Walker [1905] 1 Ch. 160 applied.

ADJOURNED SUMMONS.

By his will dated February 14, 1912, Reginald Dykes Marshall, after appointing executors and trustees and bequeathing certain specific and pecuniary legacies, devised and bequeathed all his residuary real and personal estate, subject to the payment of his funeral and testamentary expenses and debts and the legacies bequeathed by his will, to his trustees upon trust for sale and investment, and out of the fund produced by such investments to raise the sum of 6000*l.* and hold the same upon trust to pay the income to his son Fitzroy Dykes Marshall by equal quarterly payments during his life or "until he shall become bankrupt or shall assign or charge or affect to assign or charge the said income or some part thereof or until some other event shall happen

whereby if the income belonged absolutely to him he would be wholly or partially deprived of the personal enjoyment thereof." There was a gift over of the capital and income of the fund after the death of Fitzroy Dykes Marshall or the earlier determination during his life of the trust of the income in his favour.

The testator died on October 3, 1913, and his will was duly proved by his executors on November 9, 1913. On December 12, 1916, an order was made in lunacy appointing Mary Jane Marshall, the mother of Fitzroy Dykes Marshall, receiver of his estate under s. 116, sub-s. 1 (*d*), of the Lunacy Act, 1890 (53 & 54 Vict. c. 5), and s. 1 of the Lunacy Act, 1908 (8 Edw. 7, c. 47), and providing that "the whole net income of the said Fitzroy Dykes Marshall is allowed for his maintenance."

On May 15, 1919, Fitzroy Dykes Marshall signed a charge in favour of Percival Bennett and Wallace Bennett (trading as J. Bennett & Son) in the following terms :—

"I Fitzroy Dykes Marshall, ... hereby acknowledge that you have this day advanced to me the sum of 30*l.* and for securing to you the repayment thereof together with any further advances to be hereafter made with interest thereon at the rate of thirty pounds per cent. per annum computed from the date hereof I hereby charge all that my share income estate and interest whether vested or contingent under the will of Reginald Dykes Marshall . . . . with the repayment of the said sum of 30*l.* and further advances and interest. I have not mortgaged charged or in any way dealt with or encumbered my share income estate and interest whether vested or contingent under the said will and I hereby undertake to execute at my expense a legal mortgage of my said share income estate and interest under the said will if called on to do so."

This summons, which was taken out in the Liverpool district registry on behalf of Fitzroy Dykes Marshall (a person unable to manage his affairs) by his mother as his next friend on December 11, 1919, raised the question whether on the true construction of the will of the testator and in the events

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which had happened Fitzroy Dykes Marshall had forfeited his interest in the 6000*l.* fund. Evidence was filed that Fitzroy Dykes Marshall continued unable to manage his affairs.

Courthope Wilson K.C. and *G. M. Hildyard* for the plaintiff. The appointment of a receiver under s. 116, sub-s. 1 (*d*), of the Lunacy Act, 1890, did not in itself operate as a forfeiture, because the appointment did not deprive the lunatic of the enjoyment of the income, the receiver being the statutory agent of the lunatic who received the income and applied it for the maintenance of the lunatic: *In re E. G.* (1); *In re Tancred's Settlement.* (2)

Again the document of May 15, 1919, did not take effect as an assignment or charge because it was executed by a person in respect of whose estate a receiver has been appointed under the Lunacy Acts, 1890 and 1908: *In re Walker.* (3) It is true that the Court of Appeal was there considering the validity of a deed executed by a lunatic so found by inquisition, but the decision that it was invalid turned on s. 120 of the Act of 1890, which applies equally to the committee of a lunatic so found and the receiver of a lunatic not so found. The document of May 15, 1919, was therefore null and void, and the plaintiff must be taken neither to have charged the trust income nor to have affected to charge it: see also *In re Tancred's Settlement.* (2)

G. D. Pepys for the trustees and persons entitled in remainder. It is not suggested that the appointment of the receiver produced a forfeiture; but by executing the document of May 15, 1919, the lunatic at the least "affected" to charge the income of the trust fund. The word "affect" has a very wide meaning, as is shown by its definition in the Oxford English Dictionary. The lunatic here was purporting or aspiring to give a charge and was therefore affecting to do so. It is immaterial that this was only an equitable charge: *Wilkinson* v. *Wilkinson.* (4) *In re Walker* (3) is

(1) [1914] 1 Ch. 927.
(2) [1903] 1 Ch. 715, 724.
(3) [1905] 1 Ch. 160.
(4) (1819) 3 Swans. 515.

not in point here, and the decision ought not to be extended in its operation as it was a reversal of a long line of authorities that recognized it as a question for inquiry in every case whether a lunatic had executed a document in a lucid interval: *Jacobs* v. *Richards*. (1) The Court of Equity has repeatedly refused to set aside a deed executed by a lunatic when consideration has passed: *Kirkwall* v. *Flight* (2); *Selby* v. *Jackson*. (3) It is submitted that in the case of a lunatic not so found the old law still applies, and that in determining whether a document executed by him is valid the question is whether he had a lucid interval and knew what he was doing at the time and was dealing with people who had no notice of his condition. Even however if the document of May 15, 1919, was not valid, the lunatic would still have been affecting to charge his life interest so as to cause a forfeiture.

[No reply was called for.]

EVE J. Under the will of his late father, who died in 1913, the plaintiff, Fitzroy Dykes Marshall, became entitled to the income of a fund of 6000*l*. until (inter alia) he assigned or charged or affected to assign or charge the same or some part of it. On May 15, 1919, he executed this document. [His Lordship read the charge of May 15, 1919.] That document could not operate as an effective charge, because by the very execution of the document the plaintiff destroyed his life interest and thereby rendered it impossible that the persons to whom the charge was given should receive any part of the income. But the plaintiff by this instrument undoubtedly affected or attempted to charge his life interest, and if the matter rested there I should hold that he had thereby forfeited the income. There are however other circumstances which have to be taken into account.

The plaintiff was on December 12, 1916, made the subject of an application in lunacy, and by an order of that date his mother, Mary Jane Marshall, was "authorised in the name and on behalf of Fitzroy Dykes Marshall to receive

(1) (1854) 18 Beav. 300. (2) (1842) 3 W. R. 529.
(3) (1843) 6 Beav. 192.

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and give a discharge for all dividends interest and income and all arrears thereof respectively to which the said Fitzroy Dykes Marshall is or may become entitled"; and it was further directed that "the whole net income of the said Fitzroy Dykes Marshall is allowed for his maintenance from the date hereof." The first question is whether that order itself operated as a charge on the income of the fund of 6000*l.* or as a direction to pay the same to another person, and thereby put an end to the plaintiff's interest in that income. It is admitted however that this contention cannot be successfully put forward. The person appointed to act as a receiver under s. 116 of the Lunacy Act, 1890, is not strictly a receiver but the statutory agent of the person of unsound mind, and his receipt is receipt by such person and certainly not the less so where, as in this case, the whole income is directed to be applied for the maintenance of such person.

There remains for consideration the question whether the document of May 15, 1919, has any effect seeing that it was executed after the making of the order of December 12, 1916. The plaintiff contends that its execution was an invalid act and that the document is void. The order of December 12, 1916, could only have been made upon its being proved to the satisfaction of the judge in lunacy that the plaintiff was "through mental infirmity arising from disease or age incapable of managing his affairs." So that in effect it was adjudged that in December, 1916, the plaintiff was of unsound mind to the extent of being incapable of managing his own affairs. That order has not been superseded, and the question is whether in these circumstances the document of May last is or is not void. A very similar point was considered in the Court of Appeal in *In re Walker* (1), but there the Court was dealing with a lunatic so found by inquisition. The Court refused to direct an inquiry whether the lunatic had a lucid interval at the time of the execution of the document impeached and decided that it was wholly void. The question is, does the same result follow when the document is executed by a person not certified as a lunatic but respecting

(1) [1905] 1 Ch. 160.

whom an order has been made under s. 116, sub-s. 1 (*d*)? I think it is impossible to read the judgments of the Court of Appeal in *In re Walker* (1), and particularly those passages where the Lords Justices relied on the provisions of s. 120 of the Lunacy Act, 1890, equally applicable be it observed to lunatics not so found, without coming to the conclusion that their reasoning applies to these persons also. The way it is put is that the right of a person of unsound mind to manage his affairs is suspended by the order and that the sole management thereof in the meantime is committed to the committee or quasi-committee as the person appointed under s. 116, sub-s. 1 (*d*), is called in some of the judgments. If this were not so, this unsatisfactory result would follow, that the affairs of the person of unsound mind, although put under the control of one person, the receiver, would in fact be controlled by two persons—namely, the person of unsound mind and the receiver. That is a state of things which the Court ought not to recognize if it can be avoided, and it follows that in my opinion the reasoning of *In re Walker* (1) applies to a case like the present, and the decision ought to be treated as extending to persons in the position of the plaintiff. I think that the concluding words of Cozens-Hardy L.J.'s judgment apply equally to the case of a lunatic so found and a person in respect of whose affairs a receiver has been appointed. He says (2): "It cannot be right that the Crown, or the committee who represents the Crown, should have the control and management of the lunatic's estate, and at the same time that she should have power to dispose of her estate as she thinks fit. In my opinion this deed ought to be treated as absolutely null and void." So here I am of opinion that the document of May 15, 1919, ought to be treated as absolutely void, and on that footing it cannot have worked a forfeiture of the income of the fund of 6000*l.* as it would have done but for the order of December 12, 1916.

Solicitors: *Cartwright & Cunningham, for Donnison & Edwards, Liverpool; Lee & Pembertons.*

(1) [1905] 1 Ch. 160. (2) [1905] 1 Ch. 179.

H. C. G.

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Jan. 22.

In re SALOMONS.
PUBLIC TRUSTEE *v.* WORTLEY.

[1919. S. 1490.]

Executor—Pecuniary Legacy—Infant Legatee—Appropriation—Trustee Act, 1893 (56 & 57 *Vict. c.* 53), *ss.* 1, 42, 50—*Land Transfer Act,* 1897 (60 & 61 *Vict. c.* 65), *s.* 4.

An executor cannot, by appropriating the amount of a pecuniary legacy given to an infant and investing the same in any investment in which money under the control of the Court ought properly to be invested, render himself free to distribute the residue of his testator's estate without incurring personal liability in respect of the legacy and prevent recourse to the testator's residuary estate by the legatee if the fund so created should prove insufficient to pay the legacy in full upon his coming of age.

In re Hall [1903] 2 Ch. 226 discussed.

In re Salaman [1907] 2 Ch. 46 followed.

Notwithstanding s. 4 of the Land Transfer Act, 1897, the same is true even when the legatee's guardian assents to the appropriation and investment.

ADJOURNED SUMMONS.

By his will dated December 5, 1913, Leopold Salomons appointed the Public Trustee his sole executor and trustee and after giving a number of specific and pecuniary legacies, which included a legacy of 1000*l.* to the defendant Joan Wortley devised bequeathed all his residuary real and personal estate to the executor and trustee upon trust for sale and to divide the proceeds amongst various charitable institutions as therein mentioned.

The testator died on September 23, 1915, and his said will with two codicils not material for the purpose of this report were proved on August 10, 1916, by the Public Trustee. The testator left real and personal estate which was sworn for probate at over 320,000*l.*

The Public Trustee had paid all the testator's funeral and testamentary expenses and debts, invested sums to provide for annuities bequeathed by his will, paid all the pecuniary legacies other than legacies bequeathed to legatees who were

still infants, and divided parts of the residue in accordance with the trusts of the will. The defendant Joan Wortley was born on May 27, 1901.

This summons was taken out by the Public Trustee on July 9, 1919, to have it determined, (i.) whether the plaintiff as executor of the testator's will had power to appropriate a sum of 1000*l.* cash to answer the legacy of 1000*l.* bequeathed to the defendant Joan Wortley and to invest such sum of cash, with interest thereon at the rate of 4*l.* per cent. per annum from September 23, 1916, until the date of investment, for the benefit of the defendant Joan Wortley in the name of the plaintiff at his discretion in any investment in which cash under the control of or subject to the order of the Court may for the time being be authorized to be invested; and (ii.) whether upon such appropriation and investment being made (*a*) the plaintiff might properly distribute the residuary real and personal estate of the testator without regard to this legacy, and (*b*) the residuary real and personal estate of the testator would be released from all liability in respect of the legacy.

The defendants on the summons were the defendant Joan Wortley, to whom the official solicitor had been assigned as guardian for the purpose of these proceedings, and the Attorney-General as representing the charities entitled to the residue.

Clayton K.C. and *Stafford Crossman* for the Public Trustee. Under the Trustee Act, 1893, the pecuniary legacy of an infant can be paid into Court by an executor and he will then be relieved of responsibility and the residue be free for distribution. It is suggested that the same result can be obtained by the executor setting aside the amount of the legacy and investing it just as the Court would invest it. The advantage of such a course in the case of small pecuniary legacies is obvious as it would save the legatee the expense of obtaining payment out of Court of the legacy on attaining twenty-one years of age.

The old law was that a trustee could not get a valid

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discharge by paying the parent or guardian of an infant, and the practice was to procure a bill in equity to be filed against him on behalf of the legatee to enable him to dispose of the legacy under the direction and indemnity of a Court of Equity: see Roper on Legacies, 4th ed., vol. i., p. 882. Then the Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 32, enabled payment into Court of the legacy. This section was repealed by the Trustee Act, 1893, s. 51, and schedule, but by the combined effect of ss. 42 and 50 of this Act an executor could still pay the amount of a legacy into Court and so relieve himself of liability and free the residue.

The suggestion that the executor could by setting aside and investing the amount of the legacy achieve the same result was first made in *Hutcheson* v. *Hammond* (1); and see *Lee* v. *Brown.* (2) There is however a direct decision to the contrary: *Rimell* v. *Simpson.* (3) *In re Hall* (4) decided that an executor had no power to appropriate a contingent legacy when the infant legatee was not entitled to the interest on the legacy, but the reasoning of the judgments of the Court of Appeal there suggests that where a legacy to an infant is not contingent it can be appropriated either by payment into Court or by the executor setting aside and investing the amount of the legacy. This case was considered in *In re Oswald.* (5) The decision in *In re Salaman* (6) turned mainly on the express terms of the will in that case and may be distinguished on that ground.

Further there are apart from the authorities two statutory provisions which justify the course proposed by the Public Trustee. First, it is submitted that the combined effect of ss. 1 and 50 of the Trustee Act, 1893, authorize an executor to appropriate and invest an infant's legacy. Secondly, s. 4 of the Land Transfer Act, 1897, expressly provides that the legal personal representative of a testator may with the consent of an infant's guardian appropriate his legacy. The section enacts when there is to be appropriation of a

(1) (1790) 3 Bro. C. C. 128. 145.
(2) (1798) 4 Ves. 362, 369.
(3) (1848) 18 L. J. (Ch.) 55.
(4) [1903] 2 Ch. 226.
(5) [1920] W. N. 22.
(6) [1907] 2 Ch. 46.

specific asset the valuation of these assets shall be in accordance with provisions to be prescribed under that section. No such provisions have ever been made, but this is immaterial when what is proposed is appropriation of a sum of cash.

Danckwerts (*Austen-Cartmell* with him) for the Attorney-General. On behalf of the charities interested in the residue the Attorney-General supports the contention of the Public Trustee. Whether a legacy is paid into Court or set aside by an executor and invested, it will be liable to depreciation if the value of the investments falls, but if it is paid into Court the legatee in addition has the expense of obtaining payment out.

Courthope Wilson K.C. and *E. Winterbotham* for the defendant Joan Wortley. As regards the point made on s. 4 of the Land Transfer Act, 1897, it is sufficient to say that the guardian does not consent to the appropriation. Further this section has been treated as a dead letter ever since it was passed. Again s. 1 of the Trustee Act, 1893, is not directed to enabling appropriation. This was a matter dealt with by s. 42, and the relief provided was payment into Court. The obligation of the executor is to pay the legacy and that can only be effected in the case of an infant by payment into Court: *Whopham* v. *Wingfield* (1) and *Rimell* v. *Simpson* (2): compare *Baker* v. *Farmer*. (3) It is different when a legacy is bequeathed in trust, then the trustee may accept payment: *In re Waters*. (4) The decision in *In re Hall* (5) was directed to the case of a contingent legacy but *In re Salaman* (6) is a direct decision against appropriation in the case of an infant's vested legacy: see also 14 Halsbury's Laws of England, p. 302; Roper on Legacies, 4th ed., vol. i., pp. 883, 938, and Theobald on Wills, 7th ed., p. 464.

EVE J. I do not think there is any authority, statutory or otherwise, which would justify me in answering the questions propounded by this summons in the affirmative.

(1) (1799) 4 Ves. 630.
(2) 18 L. J. (Ch.) 55.
(3) (1868) L. R. 3 Ch. 537.
(4) [1889] W. N. 39.
(5) [1903] 2 Ch. 226.
(6) [1907] 2 Ch. 46.

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Those who argue in support of the affirmative answer contend that the reasoning upon which the decision in *In re Hall* (1) is founded leads to this conclusion, that in the case of a vested legacy payable immediately but which, owing either to the absence of the legatee beyond the seas, or to his being an infant, cannot in fact be paid, it is competent for the executor to set aside the legacy; and that, if he does so and invests it in the same manner in which it would be invested if it were subject to the control of the Court, he not only frees himself from any personal liability to the legatee, but is thereupon enabled to distribute the residue without the recipients thereof being liable to make good to the legatee any deficiency if the investments, in which the sum so set aside is laid out, happen to depreciate before the date at which the legacy is actually payable. I do not think that either of these results follows from anything that was said in *In re Hall.* (1) I do not read the judgment of Romer L.J. as it has been suggested that it ought to be read—namely, as drawing a distinction between investing a vested legacy and setting aside a sum sufficient to secure a contingent legacy. In both cases he is I think referring to the appropriation of a sum of money sufficient to secure the legacy; not to the setting aside of the legacy itself, but to the setting aside and investment of a sum reasonably anticipated to be sufficient, as he puts it, "to answer" the legacy. When he speaks about appropriating a sum sufficient to answer the legacy and investing a fund to answer the legacy, he means I think the same thing as when he speaks in a later part of his judgment of a fund set apart to answer "or secure" the legacy. I do not think he intended to convey the meaning that the setting aside of a sum exactly equivalent to the legacy would be sufficient in either case, but, even if he did mean that, the only result is that, if in the view of the Court the executor has done that which is reasonable before distributing the residue, the Court will in all probability hold him free from any personal liability to the legatee. The Lord Justice does not anywhere suggest, nor

(1) [1903] 2 Ch. 226.

do I think that it can reasonably be gathered from anything he said, that the setting aside or appropriation of such a sum, whether it be the exact amount of the legacy, or a larger amount, will free the residue and discharge the residuary legatees from all liability. The object of this application is to obtain a decision by which the executor will not only be protected from personal liability on setting aside and investing as proposed the amount of the legacy, but by which also the residue will be cleared and the residuary legatees be discharged from all further liability to the pecuniary legatee.

In my opinion, the only way in which those results can be brought about is by payment of the legacy into Court under s. 42 of the Trustee Act, 1893. The case of *In re Salaman* (1) which followed *In re Hall* (2) and was determined by the learned judge whose decision in *In re Hall* (2) was reversed, is an authority for this conclusion. Two other methods by which the same result might be brought about are there indicated, the one by the consent of a legatee competent to give such consent and the other by an order of the Court approving a particular appropriation in an administration action. Neither of those methods is available here ; there is not a legatee competent to give the necessary consent and there is no administration order made or asked for, and in this position of affairs I am of opinion, as I have already said, that the only way in which the executor can escape any possible liability and free the residue is by payment into Court of the amount of the legacy under s. 42 of the Act of 1893.

In so saying I have anticipated the answer to two further arguments which were addressed to me and with which I must deal. By the first it was suggested that by virtue of the combined effect of ss. 1 and 50 of the Trustee Act, 1893, the executor as a trustee within the meaning of the Act, could treat the amount of the legacy as moneys held in his hands on trust, and then invest them in accordance with the provisions of s. 1. That is an ingenious argument,

(1) [1907] 2 Ch. 46. (2) [1903] 2 Ch. 226.

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but in considering whether it is well founded it must be borne in mind that s. 42 of the same Act has been held to replace s. 32 of the Legacy Duty Act, 1796, a section framed over a century and a quarter ago to meet this very difficulty, and if in fact the difficulty can be surmounted so readily by the combined effect of the two other sections in the Act the interpretation of s. 42 as one intended to deal with the same state of things as was dealt with by the earlier Act seems a little superfluous. The real point is how can the executor get a discharge for the moneys, and where the statute indicates a means for obtaining such discharge, I do not think one is justified in straining the language of other sections for the purpose of finding out whether the same result can be brought about by means of the combined effect of two other sections of the same statute. The Act by providing a particular method of procedure seems to me to have excluded the alternative procedure suggested.

Then it is said that if the required results cannot be arrived at by those means, they may possibly be reached under s. 4 of the Land Transfer Act, 1897. In this particular case that is on any construction of the section impracticable, because the guardian of the infant is not prepared to give the consent without which the section cannot be put into operation in the case of an infant legatee, but, inasmuch as this is in the nature of a test case, I should not wish to dispose of this argument on that ground alone. It does not appear that the section has ever been put into operation, as regards personalty at any rate; there are no rules prescribing the mode of making the valuation provided for nor has any time within which interested parties may apply to the Court been fixed. In these circumstances and at this distance of time, nearly twenty-three years after the Act was passed, I should in any case feel some difficulty in imposing on the section the construction contended for, but I think the real answer to the argument is that what is contemplated being done in this and similar cases—the investment of the legacy in securities and then the appropriation of these securities in satisfaction of the legacy—is

not strictly the appropriation of any part of the residuary estate of the deceased in satisfaction of the legacy and is not therefore a transaction of the nature contemplated by the section. Nor do I think it could be held that setting aside and investing the sum of money representing the legacy was an appropriation contemplated by the section. In my opinion the section has no application to such cases as are now under consideration.

I fully appreciate that it is the desire to avoid expense which has prompted this application, and that many wish that effect shall be given to it if possible; but it must be borne in mind that, although when the amount of a legacy has been paid into Court, the legatee will ultimately have to incur the expense of getting it out, he has had in the meantime the security which the fact of the moneys being in Court gives him. He has that advantage, an advantage and security, it is true, which is possibly no greater than the advantage and security which he would have if the money remained in the hands of the Public Trustee; but all estates are not yet being administered by the Public Trustee, and there have been, I am sorry to say, many instances where it would have been far better for a legatee, and not infrequently, a legatee of a very small amount, if the executor had recognized the propriety of paying the legacy into Court, so freeing himself and the estate from any liability in respect thereof and securing to the legatee the ultimate payment of that which the testator intended him to have.

Solicitors: *Watson, Sons & Room; The Treasury Solicitor; The Official Solicitor.*

H. C. G.

SARGANT J.

1919

Oct. 16; *Nov.* 4.

In re WHITEHEAD.
WHITEHEAD *v.* HEMSLEY.

[1914. W. 745.]

Will—Construction—Gift of residuary Personalty and Realty to named Persons "or their heirs"—Words of Purchase and not of Limitation—Period of Ascertainment—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 28.

Testatrix, who died in 1895, by her will, made in 1890, gave her residuary personalty and realty, after the death of an annuitant, to her brothers and sister, F., W., J., E. (sister), and X. "or their heirs in equal shares and proportions." The annuitant died in 1917. F. died in 1891, having had ten children, seven of whom survived the annuitant. W. died in 1900, leaving two children who survived the annuitant. J. died in 1877, leaving one child, who survived the annuitant. E. died in 1893, leaving two children, who survived the annuitant. X. survived the annuitant, leaving five children:—

Held, (1.) that the will did not convert the realty into personalty; (2.) that any interest in residue given to the brothers and sister was given to them as tenants in common and not as joint tenants; (3.) that the words "or their heirs," as regarded the realty, were words of substitution and not of limitation (it being admitted that, as regarded personalty, they were words of substitution); (4.) that, as regarded personalty, the persons to take under the gift to heirs were the statutory next of kin; (5.) that, as regarded both realty and personalty, the persons to take must be ascertained, in the cases of F., J. and E. (who all died before the testatrix), at the death of the testatrix, and, in the case of each brother who survived the testatrix, at the death of that brother.

Harris v. *Davis* (1844) 1 Coll. 416 and *Greenway* v. *Greenway* (1860) 2 D. F. & J. 128 distinguished.

Observations on *In re Clerke* [1915] 2 Ch. 301.

Sarah Ann Whitehead, spinster, by her will, dated October 2, 1890 (which was proved on June 21, 1895, by the executor therein named), appointed her brother, Joseph Whitehead, her executor. The will so far as material, proceeded as follows: "I direct that all my just debts and funeral and testamentary expenses be paid as soon as conveniently may be after my decease." After giving 10*l.* to her sister Ellen Hemsley "which is to be deducted from her share referred to hereinafter," and directing her business as a milliner, stock-in-trade, money, book debts, household

furniture, and other effects to be sold and converted into money as soon as it could be done to advantage, the testatrix concluded her will as follows: "I also direct that my real estate, consisting of two shops and dwelling houses with their appurtenance situate in High Street, Knaresborough, aforesaid, and now occupied by me and Mrs. Sewall, be let or sold, as my executor shall consider most advisable, and the money realized by rents or sale or interest of money invested after paying all necessary expenses. I direct my executor to appropriate such portion as is necessary towards the maintenance of my sister Dorothy Whitehead so long as she shall live, such amount not to exceed 20*l.* per year, and at her death I give all the remainder of my money or estate unto my brothers and sister—viz., Francis, William, John, Ellen and Joseph—or their heirs, in equal shares and proportions."

The following statement of facts in inverted commas is taken from his Lordship's judgment: "The testatrix died on March 27, 1895. Her sister, Dorothy Whitehead, died on January 17, 1917. On her death the residuary estate of the testatrix consisted of the two shops and dwelling houses in High Street, Knaresborough, mentioned in her will, and her residuary personal estate consisted of a sum of 129*l.* 9*s.* 7*d.* on deposit at the Yorkshire Penny Bank, Bradford. The relevant facts as to the four brothers, Francis, William, John and Joseph, and the sister Ellen, mentioned in the will as residuary devisees and legatees, are as follows: John died before the date of the will leaving one child surviving him—namely, the defendant, John William Whitehead. When the summons first came before me, it was suggested that the testatrix may not have been aware of her brother John Whitehead's death, and I adjourned the hearing to enable a further affidavit to be filed. From this it appears that the testatrix resided next door to her brother John and attended his funeral, so that the suggestion proves to be rather ingenious than sound. Francis Whitehead died after the will but before the death of the testatrix, that is, in the year 1891, having had ten children. Of these one

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died in the year 1868, two are stated in the evidence to have died some years ago—that is, I gather, after the death of the testatrix and before the death of Dorothy Whitehead—and the other seven are still living. The testatrix's sister Ellen also died after the will but before the death of the testatrix, that is in the year 1893, leaving two children both of whom are defendants in these proceedings. The testatrix's brother, William Whitehead, survived the testatrix, and died in the year 1900 leaving two children surviving him. He left a will which has not been proved under which his widow was appointed executrix and his real and personal property were left to her for life and after her death to one of his children, a daughter. Joseph Whitehead survived Dorothy Whitehead by a few months, and died in August, 1917, leaving five children all of whom seem to be alive. He left a will, the executors of which are the plaintiffs and another son. It would appear, though it is not distinctly stated in any affidavit, that the net income of the testatrix's estate was not more than sufficient to keep down the annuity to Dorothy Whitehead."

John Whitehead's death occurred in 1877.

Ellen Whitehead married one Hemsley, and the two children of the marriage who survived her were John William Hemsley and Sarah Ann Hemsley.

The two children of William Whitehead who survived him were James Whitehead, born in 1854, and Adelaide Taylor, born in 1886.

All the children of Joseph Whitehead were born before the date of the will of the testatrix, and the executors of the will of Joseph Whitehead were two of his sons, Arthur Smith Whitehead and Joseph Whitehead.

These two persons, as legal personal representatives of the testatrix, took out an originating summons against J. W. Hemsley and S. A. Hemsley (the children of Ellen Hemsley, who claimed as her heir-at-law and one of her next of kin respectively), John William Whitehead (son and heir-at-law of John Whitehead, James Whitehead and Adelaide Taylor, respectively claiming as his heir-at-law and nominal legatee

under his will) and Thomas Whitehead (as heir-at-law of Francis Whitehead) and four other children of Francis Whitehead (claiming to be some of his next of kin), raising (inter alia) the question what persons were now entitled to participate in the division of the testatrix's residuary real and personal estate.

R. L. Ramsbotham for the plaintiffs stated the facts and the questions raised by the summons.

C. D. Myles for the defendant John William Whitehead (son of John Whitehead) and the defendants J. W. Hemsley and S. A. Hemsley (children of Ellen Hemsley). The word "heirs" should be construed as a word of purchase and not of limitation. John, although named in his sister's will, was, to her knowledge, dead at the time when it was made, and his heir, J. W. Whitehead, takes a share as purchaser, other shares being taken by J. W. Hemsley and S. A. Hemsley: *Parsons* v. *Parsons* (1); *Wingfield* v. *Wingfield* (2); *In re Philps' Will* (3); *Ive* v. *King* (4); Hawkins on Wills, 2nd ed., pp. 222, 301. These three defendants take in substitution for their respective parents.

Percy Wheeler for Adelaide Taylor. The word "heirs" should be construed as a word of limitation: *In re Clerke* (5); *Harris* v. *Davis* (6); *Greenway* v. *Greenway* (7); *In re Ibbetson* (8); *Adshead* v. *Willetts* (9); Hawkins on Wills, 2nd ed., p. 222.

J. F. Carr for the children of Francis Whitehead. Francis Whitehead's children, as heir-at-law and next of kin of a brother who died before the testatrix's will, are entitled: *Wingfield* v. *Wingfield.* (2)

Cur. adv. vult.

1919. Nov. 4. SARGANT J. (after reading the will and stating the facts): I am asked only to decide who are now entitled to participate in the division of the residuary real

(1) (1869) L. R. 8 Eq. 260.
(2) (1878) 9 Ch. D. 658.
(3) (1869) L. R. 7 Eq. 151.
(4) (1852) 16 Beav. 46.
(5) [1915] 2 Ch. 301.
(6) 1 Coll. 416.
(7) 2 D. F. & J. 128.
(8) (1903) 88 L. T. 461.
(9) (1861) 29 Beav. 358.

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and personal estate of the testatrix and for that purpose to determine certain points of construction arising on the will.

It is clear in the first place that the will does not operate to convert the real estate into personalty, and also that any interest in residue given to the testatrix's brothers and sister was given to them as tenants in common and not as joint tenants. The only really debatable question arising on the will is whether the words "or their heirs" are, as regards the real estate, to be construed as words of limitation or as words of substitution. As regards the personal estate, so far as any may in the result be left, it is admitted that the words are substitutionary.

Apart from authority, there could, I think, be no doubt as to the proper answer to give to this question. The words "or their heirs" are on their plain primary meaning substitutionary. They can be treated as words of limitation only by doing violence to the language by altering the word "or" into "and." And further, the result of this alteration would be to render the three words in question superfluous and ineffective, since without them the words of gift are, under s. 28 of the Wills Act, 1837, amply sufficient to give the brothers and sister the fee simple or other the whole estate or interest which the testatrix had power to dispose of.

But it is said that the course of decision, both before and since the Wills Act, obliges me to decide that a gift to "A. or his heirs" takes effect by way of limitation and not by way of substitution. As regards decisions prior to the Wills Act, it is clear that any rule to this effect laid down or recognized in such cases as *Read* v. *Snell* (1) was merely one instance of the various forced constructions adopted by the Courts to avoid the frustration of intention resulting from a rigid application of the technical rule requiring the employment of words of limitation to pass an estate of inheritance: see *Wingfield* v. *Wingfield* (2). When once that blot had been removed by the Wills Act, and such a prima facie interpretation had been given to devises as would undoubtedly correspond with the intentions of testators in

(1) (1743) 2 Atk. 642, 645. (2) 9 Ch. D. 658.

the great majority of cases, it would naturally follow that there should also be an end of an obviously unnatural construction which had been adopted merely to avoid a difficulty which no longer existed. And, accordingly, the best known text-writers on wills — Vaughan Hawkins, Jarman and Theobald—have been unanimous in suggesting that in devises to "A. or his heirs" or to "A. or the heirs of his body," since the operation of the Wills Act, the Courts should now recognize the natural substitutionary character of the phrase. Cessante ratione legis cessat ipsa lex.

It has, however, been strongly pressed on me that the question is concluded to the contrary by three cases decided on devises since the Wills Act—namely, *Harris* v. *Davis* (1); *Greenway* v. *Greenway* (2); and the recent case of *In re Clerke*. (3) In each of the first two of these cases there was a gift over to aid the construction of the initial gift, and in the second of these cases the language of the initial gift dealt in terms with income only; so that neither of these cases is a clear and distinct authority for the meaning to be placed even on such a devise as one to "A. or the heirs of his body." But no comment of the kind can be made on *In re Clerke* (3), which is a clear and direct decision that the construction of a devise to "A. or his issue" is precisely the same to-day as it was before the Wills Act; and also contains a distinct expression of opinion that a devise to "A. or his heirs" would be construed on the same principle.

It is to be observed that this construction of a devise to "A. or the heirs of his body" or to "A. or his issue" is not open to one of the objections to a corresponding construction of a devise to "A. or his heirs," since in the former case the words of limitation or quasi-limitation would not be ineffective or superfluous as in the case of the words "or his heirs." But this objection is a comparatively slight one: the real objection is the same in both cases—namely, the change of the plain meaning of the word "or" into "and" without any adequate cause as the law now stands. To

(1) 1 Coll. 416. (2) 2 D. F. & J. 128.
(3) [1915] 2 Ch. 301.

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my mind this last objection is the determining one, and, with much deference to the view of Eve J., I cannot help declaring my own preference for the view of the text-writers I have mentioned, at any rate so far as regards a devise to "A. or his heirs."

Had I to decide a case precisely similar to that before Eve J., I might perhaps be constrained to follow his decision for the sake of uniformity, leaving the matter to be reconsidered now or at some future period by a higher tribunal. But as the matter stands it is open to me to follow my own opinion. And this is particularly so in the present case because of two special circumstances which are present here. In the first place the gift here is a conjoint gift of realty and personalty. Undoubtedly the gift of personalty must be construed as being substitutionary, and this is a strong reason for construing the gift of realty in the same way. And further, one of the devisees mentioned in the gift was known to the testatrix to be dead at the date of the will, so that it is hardly possible that in this case at least the testatrix meant the gift to be other than substitutionary.

The other points raised by the summons are covered by authority and have not been seriously contested. It is clear that, as regards the personalty (should any remain), the persons to take under the gift to heirs are the statutory next of kin. And, as regards both the real and the personal estate, the persons to take must be ascertained, in the case of each of the brothers and sister dying before the testatrix, at the death of the testatrix, and, in the case of each of the brothers dying after the testatrix, at the death of the brother: *In re Philps' Will.* (1)

Solicitors for plaintiffs: *Halligey & Co.*

Solicitors for defendants: *Edgar Robins & Grimsdall; T. D. Jones & Co.; Hewitt, Woollacott & Chown.*

(1) L. R. 7 Eq. 151.

F. E.

In re BENNETT.
GIBSON *v.* ATTORNEY-GENERAL.

[1919. B. 1573.]

EVE J.
1920
Jan.
14, 16, 20.

Charitable Bequest—Discretion of Trustees—"Schools and charitable Institutions, and poor, and other objects of charity, or any other public objects"—Limitation to particular Locality—Validity.

By her will made in 1889 a testatrix bequeathed all her residuary estate to trustees upon trust to apply such parts thereof as were applicable by law for charitable legacies, in such manner as her trustees should, in their absolute discretion, think fit, "for the benefit of the Schools, and charitable Institutions, and poor, and other objects of charity, or any other public objects in the parish of Faringdon":—

Held, that it was a good charitable gift of the whole residuary estate, and was not to be read disjunctively.

Dolan v. *Macdermot* (1867) L. R. 5 Eq. 60; (1868) 3 Ch. 676 followed.

Houston v. *Burns* [1918] A. C. 337, distinguished.

ADJOURNED SUMMONS.

BY her will, dated August 21, 1889, Marianna Katharine Bennett, then of Faringdon House, in the parish of Faringdon, in the county of Berks, appointed the plaintiff, the Rev. Herbert Favell Gibson, and two others (since deceased), to be her executors and trustees, and after making certain specific and other bequests devised and bequeathed all her residuary, real and personal estate to her trustees upon trust for sale and conversion and to pay the income thereof to her mother, Mary Elizabeth Bennett, during her life, and after her death upon trust to pay certain legacies, and subject thereto upon trust in the first place to apply such parts of the residuary estate as were applicable by law to the payment of legacies for charitable purposes and the income thereof, in such manner as her trustees should in their absolute discretion think fit "for the benefit of the schools, and charitable institutions, and poor, and other objects of charity, or any other public objects in the said parish of Faringdon," and she declared that in so doing her trustees should have the fullest power either to retain and invest

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the last-mentioned part of her residuary estate as they should think proper and to apply the income in aid of the schools, charitable institutions, and objects, or any one or more of them, either by way of subscription, or to hand over the capital to the trustees, treasurers, or governing bodies of the said schools, charitable institutions, and objects, or otherwise to deal with and dispose of the same as they should in their absolute and uncontrolled discretion think proper, and without any liability on their part to account for such application, and she declared that her trustees should stand possessed of the residue of her residuary estate upon the trusts declared by the will of her father, Daniel Bennett, in reference to his residuary personal estate. The mother of the testatrix died on November 18, 1897.

By a codicil to her will made in 1906 the testatrix appointed the defendant, Frederick Carus Geneste Butler, and the plaintiff, Maud Corbett, executors and trustees in the place of the two trustees who had died. The testatrix died on August 26, 1918, and her will and codicil were proved by the three executors on February 13, 1919. The plaintiffs, being two of the executors and trustees, took out an originating summons asking whether the bequest of residue in the will, so far as regarded the direction for the application thereof at the discretion of the trustees for the benefit of the schools and charitable institutions and poor, and other objects of charity, or any other public objects in the parish of Faringdon, was a valid charitable bequest, or void for uncertainty.

The second defendant, F. C. G. Butler, was a residuary legatee, and the third defendant was one of the next of kin.

F. T. Maw for the trustees of the will.

Clayton K.C. and *C. E. Shebbeare*, for the residuary legatee. The use of the particle "or" makes this a disjunctive gift, and brings it within the House of Lords decisions in *Blair* v. *Duncan* (1), where the gift was for "such charitable or public purposes" as the trustees thought

(1) [1902] A. C. 37.

proper, and *Houston* v. *Burns* (1), where the gift was for "public benevolent or charitable purposes" in a particular parish. These cases together cover the present case. In both the gift, being disjunctive, was held void for uncertainty. In the present case the words "any other public objects" cannot, it is submitted, be read as extending to other public objects of a similar charitable nature, such as those previously specified. They must refer to something different.

The declaration which immediately follows the gift gives the trustees a general discretion to apply the residuary estate in specified ways "or" otherwise to deal with the same in their absolute discretion, and that avoids the whole gift for uncertainty even if the first part is held to be valid. [They also referred to *Ellis* v. *Selby* (2) and *In re Woodgate.* (3)]

Hewitt K.C. and *Sheldon* for the next of kin adopted the same arguments and submitted that as there was a discretion in the trustees to apply the residuary estate for public objects which might not be charitable, the gift failed altogether: *In re Macduff.* (4)

Austen-Cartmell for the Attorney-General. This is a good charitable gift by English law under the statute of Elizabeth (43 Eliz. c. 4). The two cases chiefly relied on by the defendants are Scotch cases to which the statute of Elizabeth does not apply. The present case comes within *In re Allen* (5), every word of which applies. It was not cited in *Houston* v. *Burns.* (1) A gift for public purposes generally is too wide, but here it is for charitable and other public objects for the benefit of the parish of Faringdon. The testatrix is sweeping up all the charitable objects besides those previously specified, and these other public objects are intended to be ejusdem generis with them, and also charitable. The gift comes within the fourth heading of what constitutes a "charity" in the legal sense as defined by Lord Macnaghten in *Commissioners for Special Purposes of*

(1) [1918] A. C. 337.
(2) (1836) 1 My. & Cr. 286.
(3) (1886) 30 Sol. J. 517.
(4) [1896] 2 Ch. 451.
(5) [1905] 2 Ch. 400.

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Income Tax v. *Pemsel* (1)—namely, "other purposes beneficial to the community."

Blair v. *Duncan* (2) and *Houston* v. *Burns* (3) on the question of construction were both held to be disjunctive cases, and are therefore inapplicable to this case which must be read conjunctively. Further, the expression "public purposes" which occurred in those cases is wider than "public objects" as the latter point to a building or institution governed by a committee. The vagueness of the gift is immaterial if it comes within the division mentioned in Lord Macnaghten's definition, and the Court can apply it. Other cases of gifts of a similar character to this are *Grimond* v. *Grimond* (4); *In re White* (5); and *Dolan* v. *Macdermot.* (6) The last case is very close to the present. What was overruled in *Houston* v. *Burns* (3) was the dictum of Lord Romilly in *Dolan* v. *Macdermot* (6), but the case was affirmed on appeal by Lord Cairns upon other grounds. Finally, the trustees in a gift of this character must have a power of selection amongst the various objects specified, and it is immaterial whether the copulative "and" or the disjunctive "or" is used. The declaration in the will beginning "in so doing" immediately following the gift for charitable objects, is merely an administrative provision or machinery for carrying out the gift, and does not enlarge the powers of the trustees.

Clayton K.C. in reply. The four divisions of charities referred to in *Pemsel's Case* (1) are discussed in Theobald on Wills, 7th ed., pp. 351–364. *In re Allen* (7), which is so strongly relied upon for the Attorney-General, was decided upon the authority of Lord Romilly's dictum in *Dolan* v. *Macdermot* (6), which was overruled in *Houston* v. *Burns* (3), so its value as an authority is diminished. It was argued that "public purposes" were wider than "public objects," but these words are used interchangeably in several cases and

(1) [1891] A. C. 531, 583.
(2) [1902] A. C. 37.
(3) [1918] A. C. 337.
(4) [1905] A. C. 124, 603.
(5) [1893] 2 Ch. 41.
(6) L. R. 5 Eq. 60; 3 Ch. 676.
(7) [1905] 2 Ch. 400.

really mean the same thing. If the "any other public objects" are also to be held to be charitable objects, the words add nothing to the clause and are mere surplusage. In *In re Sutton* (1) the gift was to "charitable and deserving objects," and the use of the conjunctive "and" was help to make the gift good. But in *In re Woodgate* (2), where the gift was to "sick poor" or "for any other utilitarian purposes" it was held void for uncertainty.

The real question is whether the gift is to be read as a disjunctive or a conjunctive gift. We submit it must be read disjunctively. "Or" is sometimes read "and," and "and" read as "or": *In re Best* (3) and *Attorney-General for New Zealand* v. *Brown*. (4)

EVE J. (after stating the terms of the gift in the will, and the declaration which followed it, continued :) The question is whether that bequest is a valid charitable bequest, or is void for uncertainty. It is a question which has occupied a good deal of time in argument and is one, I confess, of some difficulty. Now first, what is the proper construction of the words used by the testatrix ? They are, in my opinion, a direction to the trustees to expend or lay out the specified part of her residuary estate for such charitable or other public objects as they may think fit for the benefit of the parish of Faringdon, coupled with an enumeration of the charitable objects the testatrix particularly desires to benefit. Why is that not a good charitable gift ? Because it is said the testatrix, by the use of the disjunctive particle "or" between the words "objects of charity" and the words "any other public objects," has conferred upon the trustees a power of selection extending to objects not charitable, and has thereby introduced an element of uncertainty rendering the whole gift void. To this it is answered that the particle "or" followed as it is by the word "other" is not used disjunctively, but properly as a particle marking distribution at the end of a list of enumerated items over which the power of selection

(1) (1885) 28 Ch. D. 464.
(2) 30 Sol. J. 517.
(3) [1904] 2 Ch. 354.
(4) [1917] A. C. 393.

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extends, and that "the other public objects" must be ejusdem generis with the specified ones. I think this latter is the correct view, and that, in substance, this is a gift for such charitable and other public objects for the benefit of the parish of Faringdon as the trustees may select. This construction, supported as it seems to me by the fact that the testatrix carefully limited the subject of the gift to that part of her estate which could at that time lawfully be applied for charitable purposes and by the use, in the declaration immediately following the gift, of the conjunctive "and" before the words "objects, or any one or more of them," and later on before the word "objects," brings the case exactly within the language and decision of Lord Cairns in *Dolan* v. *Macdermot* (1); and unless his judgment is to be treated as overruled by the recent case of *Houston* v. *Burns* (2) in the House of Lords, I am bound to follow it. The gift in that case was a gift to trustees in trust to lay out the same "in such charities and other public purposes as lawfully might be in the parish of Tadmarton." That gift Lord Cairns construed as a gift to trustees of money to be laid out "In such charities and other public purposes as they think fit for the benefit of the parish of Tadmarton."

After alluding in his judgment to the technical and legal meaning of the terms "charity" and "charitable purposes," and pointing out that the testator when he used the word "charities" clearly did not mean private charities because he accompanied the term with the words "and other public purposes," thereby implying that the word first used meant "public charities," he proceeded as follows: "It therefore appears to me the reasonable and fair construction to be put upon this will—remembering always that in construing a will of this kind the Court must not lean to the side of avoiding the will in order to gain money for the family, nor, on the other hand, strain to support the will to gain money for the charity—is that the testator directs his residue to be laid out for the benefit of the parish of Tadmarton 'in public charities,' using that term in the

(1) L. R. 3 Ch. 676, 678. (2) [1918] A. C. 337.

popular sense, 'and in other public purposes' ejusdem generis, using those latter words as supplying and filling up a description of the purposes which, although within the statute of Elizabeth and the technical doctrine of the Court with regard to charities, are not within the popular meaning of the word 'charities.' By using these latter words the testator has simply given a description of all that is charity in the technical sense in which that word is used by the Court; and he has, therefore, pointed out a charitable gift for the benefit of the parish of Tadmarton." So in this case I come to the conclusion that the testatrix intended by her reference to "other public objects" to demonstrate that she intended to include in her area of selection, or, as it has been called, in her ambit of choice, all purposes comprised in the word "charity" in its legal sense—and for those purposes I refer to the judgment of Lord Macnaghten in *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (1); and this, in my opinion, brings the case within the reasoning and judgment of Lord Cairns. I have read very carefully what was said by Lord Finlay, from whose judgment none of the learned Lords dissented, in *Houston* v. *Burns* (2), and I cannot see that there is anything there to impugn the correctness of Lord Cairns' judgment. All that was said was that Lord Romilly's dictum, when deciding the case in the first instance, that a gift for such public purposes as the trustees should select ceased to be void for vagueness or uncertainty if the public purposes were to be for the benefit of a particular specified parish, was incorrect. *Houston* v. *Burns* (2) applies only to cases where the gift for public purposes, or public objects is read disjunctively from the gift for charitable purposes. Until this severance is imported into the construction of the instrument under consideration the decision is not in point, but once read the gifts disjunctively then an element of uncertainty is introduced, which is not removed by the power of selection being restricted in exercise to a particular parish. Beyond this the decision does not, in my opinion, affect anything that was said or

(1) [1891] A. C. 531, 583. (2) [1918] A. C. 337.

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decided in *Dolan* v. *Macdermot* (1), and inasmuch as on the matter of construction I do not read this gift disjunctively, I do not consider that this case is governed by the decision in *Houston* v. *Burns*. (2) I think this case falls within *Dolan* v. *Macdermot* (1), and although no doubt the judgment in *In re Allen* (3) is open to criticism in so far as it proceeds upon the acceptance as correct of Lord Romilly's dictum, much else survives to support the decision, and I regard it as still good law and an illustration of the principle laid down in *Dolan* v. *Macdermot*. (1)

The result is that in my opinion this is a good charitable gift unless there be introduced by the latter part of the declaration which follows the gift a general discretion authorizing the trustees to apply the money for any purpose they choose. That would undoubtedly avoid it for uncertainty. But, in my opinion, the whole of the declaration following the gift is governed by the introductory words "in so doing" and the wide discretionary powers thereby conferred upon the trustees are limited in their application to the administration of the trust and do not affect its nature or scope. By the alteration which has been made in the law since the date of the will the whole residuary estate of the testatrix is now applicable for charitable purposes (*In re Bridger* (4)) and accordingly I direct an inquiry of what the residuary estate consists, and order a scheme for its application to be brought in.

Solicitors: *Francis & Calder; Treasury Solicitor.*

(1) L. R. 3 Ch. 676.
(2) [1918] A. C. 337.
(3) [1905] 2 Ch. 400.
(4) [1894] 1 Ch. 297.

G. M.

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SARGANT J.

1918

Nov. 15.

[1918. H. 573.]

Power—Given "in case of" the happening of a Contingency—Exercise before Contingency happens—Subsequent happening of Contingency—Validity of Appointment—Conveyancing Act, 1881 (44 & 45 *Vict. c.* 41), *ss.* 2 (*v.*), 63.

A power given to a designated person for his own benefit, and expressed to be dependent on a contingency, is, as a rule, capable of being exercised either before or after the happening of the contingency—the Court being inclined to treat the contingency as a condition of the operation of the appointment rather than as a condition of the exercise of the power.

The rule as stated in the second edition of Farwell on Powers, p. 144, referred to the rule as stated in the third edition of that work, p. 166.

By a settlement made in 1880 it was provided that "in case Lady B. shall during the lifetime of Lord B." become entitled to the possession of certain hereditaments, of which she was tenant for life expectant on the death and failure of issue of K., it should be lawful for Lord B. by deed or will to charge certain estates the subject of the settlement with the payment to him of 10,000*l.* and interest. Lord B. exercised the power by deed in 1883, but the hereditaments did not come into the possession of Lady B. until 1886. Lord B. died in 1901:—

Held, that the power was validly exercised.

The late William, Lord Bateman, was married in the year 1854 to Miss Agnes B. Kerrison, referred to in the pleadings as the Dowager Lady Bateman. At the date of the resettlement below mentioned she was entitled in certain contingencies to considerable estates settled and known as "the Kerrison Estates."

By the indenture of resettlement, which was dated March 25, 1880, the Shobdon Court Estates in the county of Hereford were, together with other estates, settled upon the late William, Lord Bateman, for life, and after his death, which occurred in 1901, subject to a term of 500 years vested in trustees for securing portions, upon William Spencer, the present Lord Bateman, for life, with remainder in strict settlement to his male issue, in tail male, in the usual manner.

The resettlement contained the following proviso: "Provided always and it is hereby agreed and declared that in case the said Lady Bateman shall during the lifetime of the

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said Lord Bateman become entitled to the possession or to the receipt of the rents and profits of certain hereditaments situate in the counties of Norfolk and Suffolk, and whereof by virtue of the limitations contained in the wills of Matthias Kerrison and Sir Edward Kerrison, respectively deceased, and of an indenture dated March 24, 1853, she is tenant for life in remainder expectant on the death and failure of issue of the said Sir Edward Clarence Kerrison, and which hereditaments have by an indenture bearing even date with these presents been resettled in accordance with the terms of the said hereinbefore mentioned family arrangement, it shall be lawful for the said Lord Bateman by any deed or deeds, with or without power of revocation and new appointment, or by will or codicil (but subject and without prejudice to the said term of 500 years and the trusts thereof), to charge all or any part of the said Kelmarsh Estates and Shobdon Court Estates, hereby limited and appointed, with the payment to him the said Lord Bateman or any other person or persons, and his or their executors, administrators or assigns, of any sum or sums of money not exceeding in the whole the sum of 10,000*l.*, with interest for such sum or sums after any rate not exceeding 4*l.* 10*s.* per cent. per annum from the time or times of such sum or sums respectively being so charged or from any later time or times."

By an indenture dated May 29, 1883 (before the event happened of Lady Bateman coming into possession of the Kerrison Estates), the late Lord Bateman, in exercise of the power in the resettlement, purported irrevocably to appoint, subject and without prejudice to the term of 500 years and the trusts thereof, that in case Lady Bateman should during his lifetime become entitled to the possession or receipt of the rents and profits of the Kerrison Estates, then and in such case and thereupon and henceforth all the Kelmarsh Estates and Shobdon Court Estate, limited as in the resettlement was mentioned, should be subject and charged to and with the payment to him, his executors, administrators and assigns, of the sum of 10,000*l.*, with interest thereon as therein mentioned. And by the same

indenture, in exercise of the same power, he appointed the estates so charged unto trustees for a term of 1000 years, to commence from the day on which Lady Bateman should during his lifetime become entitled to the rents and profits of the Kerrison Estates, upon trusts for securing the moneys so charged.

On July 3, 1886, the contingency happened by Lady Bateman becoming entitled to the Kerrison Estates.

By an indenture dated December 10, 1895, the late Lord Bateman and his trustee in bankruptcy "conveyed" to the defendants R. J. Foster and John Wood, by way of mortgage to secure large sums of money (subject to all prior estates, encumbrances and estates therein), amongst other things, "the principal sums" and interest, equities of redemption, and other estates and interests of himself or his trustee in bankruptcy under or by virtue of the several indentures therein referred to which were set out in a schedule and in fact included the indenture of appointment of May 29, 1883.

The present action was brought by the Honourable Charles Stanhope Melville Bateman Hanbury, one of the younger sons of the late Lord Bateman, who had acquired all the estate and interest of the present Lord Bateman in the Shobdon Court Estates, against the present Lord Bateman, who was the personal representative of his father the late Lord Bateman, and against certain mortgagees of the charge, claiming, amongst other things, a declaration that the sum of 10,000*l.* purporting to be created by the deed of May 29, 1883, was not validly charged and was not a valid and subsisting charge on the said estates. The defendant, the present Lord Bateman, by his defence alleged that his father had validly exercised the power and that the charge was a subsisting charge on the Shobdon Court Estates.

Rolt K.C. and *Christopher Farwell* for the plaintiff. The power was to be exercised on the happening of the contingency of the Dowager Lady Bateman becoming entitled in possession in the late Lord Bateman's lifetime, and as he purported to exercise it before the contingency occurred,

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it was not validly exercised. This case is distinguishable from *Wandesforde* v. *Carrick* (1); *Countess of Sutherland* v. *Northmore* (2); and *Dalby* v. *Pullen.* (3)

[They also referred to *Eden* v. *Wilson* (4); Farwell on Powers, 3rd ed., r. 9, p. 166; Sugden on Powers, 8th ed., c. 7, s. 6 (5.); and Chance on Powers (1841), p. 153.]

[SARGANT J. referred to *Holt* v. *Burley.* (5)]

Romer K.C. and *J. M. Stone* for the mortgagees of the charge. This case cannot be distinguished from *Wandesforde* v. *Carrick.* (1) The power to charge was validly exercised by its execution before the contingency occurred. The words "in case" do not govern the execution of the power; they only govern the taking effect of the charge.

[They also referred to *Logan* v. *Bell.* (6)]

Stafford Crossman for the present Lord Bateman adopted the argument of the mortgagees' counsel, and referred to s. 63, sub-s. 1, of the Conveyancing Act, 1881. He contended that, by virtue of that section, the "conveyance" to the mortgagees by the deed of December 10, 1895, which was subsequent in date to the happening of the contingent event, operated as an effectual execution of the power of appointment over the 10,000*l.*, or, at any rate if defective, would be aided in equity.

G. W. Brabant and *A. L. Ellis*, for other defendants, took no part in the argument on this point.

SARGANT J. The first point that I have to determine here is one that appears to me to be a separate point from the other points arising, and therefore a point that can be dealt with without waiting for the arguments on the other questions, and it is, whether a sum of 10,000*l.* purporting to be charged, by an indenture dated May 29, 1883, on the Bateman Settled Estates—what I think are called the "Shobdon Court Estates"—was validly charged. If it was validly charged on those estates, there will be a subsequent

(1) (1871) I. R. 5 Eq. 486.
(2) (1729) 1 Dick. 56.
(3) (1824) 2 Bing. 144.
(4) (1852) 4 H. L. C. 257, 283.
(5) (1710) 2 Vern. 651.
(6) (1845) 1 C. B. 872.

question as to whether it may have ceased to be a charge by virtue of the Statute of Limitations.

I have first to deal with the question whether it was validly charged, and the main point arises on the construction of the clause in an indenture of resettlement of March 25, 1880. [His Lordship stated the facts, and continued:] I must say that I had thought, before the interesting argument which I have heard, that the point was completely covered by authority, and, after having listened to the argument, I feel convinced that that is so. The principal authorities are those mentioned in Farwell on Powers, 3rd ed., p. 166, and particularly *Wandesforde* v. *Carrick* (1) and *Countess of Sutherland* v. *Northmore* (2); but I think there is also a most important case not actually referred to on that page, but referred to on the following page without being cited—namely, *Dalby* v. *Pullen*. (3)

Now the summary of the cases in the second edition of Farwell on Powers, p. 144, is in these terms: "A power presently given to a designated person, to be exercised upon a contingency, can be well exercised before the contingency happens." In the third edition it is suggested that that statement of the law is liable to misconstruction, and an alternative statement is suggested which is printed in large type, and is in these terms: "A power presently given to a designated person, the exercise of which does not depend upon the happening of a contingency, but an appointment under which can only take effect after the happening of a contingency, can be well exercised before the contingency happens." I must say that I prefer the statement of the law in the second edition, because, although it may possibly be liable to misconstruction, it does give one some guidance in these matters, while the suggestion in the third edition, though no doubt accurate, seems to me really to partake of the nature of a truism. If the exercise of it does not depend on the happening of a contingency but the appointment under it can only take effect after the happening, it is of

(1) I. R. 5 Eq. 486. (2) 1 Dick. 56.
(3) 2 Bing. 144.

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course clear that it can be well exercised. That appears to be assumed in the words "the exercise of which does not depend upon the happening of the contingency." But after having considered the cases to which I have referred, I think the rule may be stated both accurately and so as to be useful by way of guidance in these terms, that is to say: A power given to a designated person for his benefit—that is the only class of power one must deal with—and expressed to be dependent on a contingency, is as a rule capable of being exercised either before or after the happening of the contingency. The Court is inclined to treat the contingency as a condition of the operation of the appointment rather than as a condition of the exercise of the power.

It seems to me that, as a matter of authority, the cases I have mentioned, and particularly *Dalby* v. *Pullen* (1), bear out that proposition completely; and I notice that Lord St. Leonards is quoted as saying in *Eden* v. *Wilson* (2): "It has been decided many times, that a power to operate upon a contingent event, like that of a death, may be exercised in the lifetime of the party upon whose death alone that contingency can take effect; otherwise you might never exercise it at all." That seems to be an accurate statement no doubt, but possibly a narrower statement than would be sufficient for the decision of this case, but I do not think it is in any way antagonistic to the way in which I have stated the rule. It may be an additional consideration that the power otherwise could not be exercised at all, but, apart from that consideration, I think the cases bear out the rule which I have endeavoured to put into precise language. I think that in such cases as this the reason of the rule is fairly obvious. What is of importance is not whether the power is exercised at a particular time or not, but whether the contingency has happened which makes it expedient that the power should be available. Here, apparently, it was thought that if Lady Bateman became entitled to these other estates, the Kerrison Estates, then the Shobdon Court Estate and the Kelmarsh Estate could bear

(1) 2 Bing. 144. (2) 4 H. L. C. 257, 283.

a larger charge upon them for the benefit of Lord Bateman. The question whether the two sets of estates became vested in the person of Lady Bateman was entirely independent of the question of the time at which Lord Bateman could exercise the power. The words "In case the said Lady Bateman shall become entitled" are not temporal words but words referring to a contingency, an event, and I can find nothing in the subsequent words to indicate that the power had to be exercised at any particular period.

Some stress was laid upon this, that the sum of 10,000*l.* was only to bear interest from the time of the sum being so charged, but I think that those words "the sum being so charged" are at least as referable to the operation of the charge as to the exercise of the charge. That being so, I have not to decide one or two other interesting questions which were raised, as to whether the defective appointment was cured by virtue of an indenture that was executed subsequent to the occurrence of the event, and particularly by virtue of a deed of December 10, 1895, in which both the late Lord Bateman and his trustee in bankruptcy joined. But I may indicate my view that, as far as the mortgagees under that indenture are concerned, there was, if not an actual execution of the power, still such a transaction as would be made effective in equity in favour of the mortgagees.

There was a further ingenious argument by Mr. Stafford Crossman as to how the matter stood under the indenture of December 10, 1895, with relation to the persons taking thereunder other than the mortgagees. He tried to make out that by virtue of s. 63 of the Conveyancing Act of 1881 and the interpretation section of that Act (s. 2) the conveyance would have taken effect as an appointment in their favour also. I am inclined to think that on the particular language it might have taken effect as an appointment for this reason, that principal sums were mentioned, and I do not think that those words would be satisfied unless you came to the conclusion that they referred to this principal sum of 10,000*l.* But I must dissent from the view that the conveyance must be construed as both a conveyance and

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an appointment so as to give effect to the Act. The effect of the Act may be this, that a conveyance will have the effect of conveying every estate and interest which the person conveying can convey, and that similarly an appointment will have the effect of appointing every estate and interest that the appointing person can appoint; but that would seem to be the limit of operation of the definition clause, which says that "conveyance" shall include an appointment and "convey" shall have a corresponding meaning. I do not think you can read the definition clause of the Act so as to provide that a conveyance shall operate not only to convey everything that the person could convey, but also to appoint everything he could appoint. That would be to read a definition clause in an Act so as to make it operate as a definition clause in a subsequent instrument, which appears to me to be unsound.

Solicitors: *Fowler, Legg & Young; G. F. Hudson, Matthews & Co.; Hammond & Richards.*

F. E.

EVE J. 1919 *April* 30.

In re RIVERS.

PULLEN *v.* RIVERS.

[1918. R. 471.]

Administration—Annuity—Appropriation of Consols—Reversionary Legacy—Distribution of Estate—Orders of Court—Legatees not Parties—Insufficiency of Fund—Residuary Legatees—Liability to Refund.

A testator who died in 1863 gave certain life annuities including one of 8*l.* to the mother of the plaintiff, and after her death he bequeathed a legacy of 200*l.* to her children equally. The interest of his residuary estate was given to the testator's daughter for life, and then the capital to her children. In an action to administer the testator's estate, it was ordered in 1873 that a sum of 266*l.* 13*s.* 4*d.* Consols should be carried to a separate account to answer the annuity of 8*l.* By subsequent orders made in 1885, and 1904, of which no notice was given to the annuitant or her children, various sums were directed to be paid out to the residuary legatees. On the death of the plaintiff's mother in 1917 the sum of Consols proved insufficient to satisfy in

full the legacy of 200*l.* to her children. In an action by the plaintiff, as one of the children entitled to a share of this legacy, against the representatives of one of the residuary legatees to make good the deficiency:—

Held, that the fund having been set aside to secure the annuity only the plaintiff was entitled to follow the assets in the hands of the residuary legatees and to recover the deficiency in her legacy, as she could not be held bound by proceedings to which she was not a party.

ACTION.

The plaintiff in the action was Mary Ann Tharp Pullen, who was entitled to a share of a reversionary legacy of 200*l.* under the will and codicil of John Tharp, and the defendants were the legal personal representatives of William Rivers deceased, one of the residuary legatees under the will. The plaintiff sought to recover from the defendants the amount whereby her share of the reversionary legacy fell short of the sum she would have received in respect thereof had the estate been administered in the usual course of administration. She had only received 12*l.* 8*s.* 9*d.* Under the joint effect on the testator's will and codicil the applicant's mother, Mrs. Mary Ann Tharp Brown, was entitled to a life annuity of 8*l.*, and at her death her children were entitled in equal shares to a legacy of 200*l.* The testator died in 1863 and letters of administration with the will annexed were granted to his daughter Harriet Rivers. In 1871 a decree was made in a suit in which Jane Deborah Fish, another annuitant under his will, was plaintiff, for the administration of his estate and the execution of the trusts of his will. By an order made on further consideration on May 27, 1873, it was ordered that 266*l.* 13*s.* 4*d.* Consolidated 3*l.* per cent. annuities should be carried over to a separate account entitled "The annuity account of Mary Ann Tharp Brown, the wife of Frederick Charles Brown," and that the dividends thereon should be applied in keeping down the said annuity. Other annuities, including one to the plaintiff in the action, were provided for in like manner, and the ultimate residue of the estate was ordered to be carried over to the credit of an account to be entitled "The net residuary account of the testator subject to succession duty

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and subject to legacy duty," and invested in Consolidated 3 per cent. annuities and the dividends of this account were ordered to be paid to Harriet Rivers, the tenant for life of the residue, during her life, or until further order; and on her death any persons entitled to or interested in the said annuities were to be at liberty to apply. Harriet Rivers died on February 7, 1885, leaving three children (of whom William Rivers was one) and thereupon the residue became divisible subject to provision being made, amongst other things, for the legacy of 200*l.* to Mrs. Tharp Brown's children. On an application made by the three residuary legatees under the testator's will, the amount standing to the credit of the net residuary account was, by an order of July 13, 1885, in substance ordered to be paid out to them and their mortgagees, and pursuant to that order William Rivers received one third of the sum then distributed. In 1904 Mary Frances Williams, another annuitant whose similar annuity of 8*l.* had been secured by carrying over a like amount of Consols to that carried over to the annuity account of Mrs. Tharp Brown, died, and on her death there became payable to her only child a legacy of 200*l.* By an order of July 1, 1904, the fund so carried over was ordered to be sold, and the surplus proceeds, after providing for the annuity down to the death of the annuitant, and for the legacy to the child of the annuitant, were ordered to be paid to the residuary legatees and their incumbrancers. William Rivers died on May 16, 1915, having appointed the defendants his executors. These orders of July 1885 and July 1904 were made without notice to Mrs. Tharp Brown or her children. Mrs. Tharp Brown died in 1917 having had eight children, two of whom had died. At her death the proceeds of the fund set aside to answer her annuity constituted the only outstanding estate of the testator, and were insufficient to pay costs, duties, and the legacy to her children. The amount of the plaintiff's share in the distribution fell short by 18*l.* of the sum to which she was properly entitled. She accordingly brought this action as a test action with the view of establishing her

right, and the right of other persons interested in the legacy, to recover the deficiency from the residuary legatees. The defendants admitted assets in their hands of William Rivers sufficient to answer any valid claim of the plaintiff.

C. P. Sanger for the plaintiff. A residuary legatee is entitled to payment only after all legacies have been satisfied. There is no question of a trust, or of the Trustee Act, 1888. The sum set aside has proved insufficient owing to the depreciation of Consols, nor was it set aside to answer the legacy but only the annuity of 8*l*. The residuary legatees have therefore been overpaid, and, on the authorities, the Court will direct the deficiency to be refunded by them. He referred to *Anonymous* (1), *Walcott* v. *Hall* (2), *Gillespie* v. *Alexander* (3), *David* v. *Frowd* (4), *Sawyer* v. *Birchmore* (5), *Peterson* v. *Peterson* (6), and *Prowse* v. *Spurgin.*(7)

C. Johnston Edwards, for the defendants. The defendants being, as is admitted, in no sense trustees for the plaintiff, the claim against them is one for money had and received. The estate has been administered thirty-four years ago, but under the circumstances of this case I cannot rely on the Statute of Limitations. It is a case of mistake and the deficiency has occurred through no fault of the residuary legatees. The distribution of the residuary estate was properly made under the various orders of the Court, and at the dates of those orders the fund set apart was fully sufficient to meet this reversionary legacy. The claim is a money demand in equity in respect of a loss arising from a depreciation of Consols which could not have been reasonably expected. I submit that there is no cause of action: *In re Robinson.* (8) He also referred to *Peterson* v. *Peterson* (6), and *Fenwick* v. *Clarke.* (9)

EVE J. (after stating the facts and the orders which had been made, continued). The orders of July 1885 and July

(1) (1718) 1 P. Wms. 495.
(2) (1788) 2 Bro. C. C. 305.
(3) (1827) 3 Russ. 130.
(4) (1833) 1 My. & K. 200.
(5) (1837) 2 My. & Cr. 611.
(6) (1866) L. R. 3 Eq. 111.
(7) (1868) L. R. 5 Eq. 99.
(8) [1911] 1 Ch. 502.
(9) (1862) 31 L. J. (Ch.) 728.

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1904 were made without notice to Mrs. Tharp Brown and her children, and must, I think, have been made without the parties thereto appreciating that the 266*l.* 13*s.* 4*d.* Consols appropriated to secure the annuity of Mrs. Tharp Brown had not been appropriated to secure the legacy of 200*l.* bequeathed to her children, or they may possibly have thought that on the falling in of the annuity, the fund set aside to answer it would be sufficient to provide for the legacy. But whatever was the reason for so framing the orders as to bring about a distribution of residue without adequately providing for legacies, the legatees cannot, in the circumstances, be bound or prejudiced by proceedings to which they were not parties. If this were an action in which the facts were such as to justify the defendants in relying on the lapse of time as affording a defence by analogy to the Statute of Limitations it may well be that the decision in *re Robinson* (1) upon which Mr. Johnston Edwards relied would have been an answer to the plaintiff's claim, but as he has candidly admitted the facts here leave no room for any argument founded on the Statute, and his real defence is that the plaintiff is seeking to make the residuary legatee liable for an unforeseen loss whereby a fund, adequate at one time to answer the claim of the legatee, has become inadequate by reason of circumstances which have arisen since it was set aside. He contends that at the date in 1873 when the sum was appropriated to the mother's annuity, and again in 1885 when payments were made to the residuary legatees, and finally in 1904 when the Williams annuity determined there was a sufficient fund in hand to meet this reversionary legacy, and that in these circumstances it would not be right to make the residuary legatees answerable for loss due to the unlooked-for depreciation which has since occurred. The plaintiff does not admit that the fund in question was ever an adequate provision, and if this were established it would of course dispose of the defendant's argument as just stated; but I think there is another and shorter answer to it in

(1) [1911] 1 Ch. 502.

this, that the fund never was set aside to provide for the legacy. It was appropriated to answer the annuity and for that purpose only, and although it may well be that the residuary legatees believed that it afforded a sufficient retention to provide for the legacy, and received payment of moneys on account of residue on that footing, I do not think it is open to them, now that their belief as to the sufficiency of the fund has been falsified, to rely on the existence of this fund—set aside, as I say, to secure the payment of the annuity and nothing else—as a defence to this action. In my opinion, the defendants admitting assets of the late William Rivers sufficient to satisfy the claim of the plaintiff, she is entitled to recover the difference between the sum she actually received in respect of her share in the legacy of 200*l.* and what she would have received had the testator's estate been distributed in due course of administration, and if the figures cannot be agreed an inquiry must be directed. The defendants must pay the costs of the action.

Solicitors: *A. E. Cubison; H. G. Kenyon, for Albery, Lucas & Beresford, Midhurst.*

G. M.

C. A. 1919 *Jan.* 30, 31.

In re BRITISH RED ASH COLLIERIES, LIMITED.

[1918. B. 1100.]

Landlord and Tenant—Mining Lease—Trade Fixtures—Fixed Machinery—Covenant at End or sooner Determination of Term to leave in good Repair all fixed Machinery—Tenant's Right of Removal.

In 1905 M. granted a mining lease to the predecessors in title of the company whereby the lessees covenanted (clause 13) that "at the end or sooner determination of the term all erections, fences and fixed machinery in the demised seams or on the surface of the said premises shall be left in good repair and condition by the lessees." The working of the coal proved unremunerative and certain holders of debentures issued by the company brought an action to enforce their security, and obtained the appointment of a receiver. In pursuance of an order in the action the receiver, during the existence of the term, sold the machinery and plant upon the premises, and paid the proceeds into Court. Upon a motion by M. for a declaration that certain articles of machinery sold by the receiver were fixed machinery or erections within clause 13, Astbury J. held that the machinery in question was fixed machinery forming part of the tenant's trade fixtures, and that clause 13 only prevented the removal of such fixed machinery as was in fact fixed or in situ at the end or sooner determination of the term :—

Held, on appeal, that clause 13 operated to deprive the tenants of their right to remove trade fixtures, and as the articles in question had been severed and sold during the term M. was entitled to affirm the sale and to recover the proceeds immediately without waiting until the end of the term.

Decision of Astbury J. reversed.

Appeal from a decision of Astbury J.

By an agreement for a lease dated June 8, 1905, Lady Elizabeth Margaretta Morgan demised certain lands in Glamorganshire for twenty-one years from June 1, 1905, for the purpose of working the coal therein contained. In July, 1914, the lessees assigned the benefit of the agreement to the British Red Ash Collieries, Ld.

Under the agreement the lessees were to pay certain royalties to the lessor. Clause 2 provided that if at any time during the term the mines should prove to be unworkable at a profit from any cause not attributable to

improper working or to any default or neglect of the lessees they might give notice in writing to determine the agreement which should be determined accordingly.

By clause 6 the lessees were to be at liberty to take and use such portion of the surface as should be approved by the lessor for the purpose of opening pits or other necessary purposes connected with the working of the coal.

Clause 13 provided that at the end or sooner determination of the term all erections fences and fixed machinery in the demised seams or on the surface of the premises should be left in good repair and condition by the lessees, who should also restore and make good the condition of such portions of the surface as should have been taken by them under the provisions thereinbefore contained (except such portions as should have been used for the deposit of rubbish or the erection of buildings) so as to be fit and suitable for agricultural purposes as theretofore.

By clause 21 at the end or sooner determination of the term the lessor might purchase all or any of the movable machinery plant articles and things in upon or under the said lands or any part thereof and used in connection with the mines at such price as might be agreed between the lessor and lessees or failing agreement as might be determined by valuation to be the price which the articles would realize if offered for sale by auction by the lessees subject to a condition that they must be forthwith removed from the premises by the purchaser, and all such movable machinery plant articles and things as the lessor did not so elect to purchase should remain the property of the lessees and subject to any other rights or powers of the lessor might be removed by them.

The working of coal proved unremunerative, and the Eastern Valleys Black Vein Collieries, Ld., as holders of certain debentures issued by the British Red Ash Collieries, Ld., commenced a debenture holders' action to enforce their security, and obtained the appointment of a receiver.

By an order in the action the receiver was directed to sell by tender the agreement for a lease of the colliery together with the plant machinery fixtures chattels and effects

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(other than the erections fences and fixed machinery or anything forming part of the freehold) and to pay the proceeds into Court. At the time of the order the coal under the demised lands had been practically worked out.

Sales of the machinery and plant took place at different dates, and Lady Morgan as lessor now moved the Court for a declaration that a certain electric hauling engine, a horizontal steam boiler and a winding engine sold by the receiver were fixed machinery or, alternatively, erections within the meaning of clause 13, and that under that clause she was entitled to the proceeds received for those items. The sum so received and paid into Court amounted to 690*l.*

The defendants, the debenture holders and the receiver, contended that the articles of machinery in question were not "fixed machinery" or "erections" within the meaning of clause 13, and that even if they were the lessees had a right at common law to remove them as being trade fixtures at any time during the term, whatever the position might be at its determination.

Astbury J. held as a fact that the articles in question were "fixed machinery" and formed part of the tenant's ordinary trade fixtures, and in the absence of very clear language to the contrary might be removed by the lessees. Neither clause 13 nor clause 21 provided that fixed or movable articles once brought upon the premises should be kept there until the end of the term. Clause 13 did not provide that no trade fixtures might even be removed for purposes of repair or renewal. That clause only prohibited the removal of such fixed machinery as was in fact fixed or in situ at the end or sooner determination of the term.

Lady Morgan appealed.

Micklem K.C. and *D. D. Robertson* for the appellant. Clause 13 was introduced into the agreement for the purpose of preventing the exercise by the tenants of the right of removal which they would otherwise have had. Clause 21 distinguishes between fixed and movable machinery and provides for the pre-emption of the latter. So far as fixed

machinery is concerned that is to be left on the land without payment. All other machinery may be purchased by the lessor. All fixtures attached to the freehold form part of the freehold, and only tenant's fixtures can be removed at the end of the term. The agreement here is express. [They were stopped by the Court.]

Hon. Frank Russell K.C. and *P. F. Wheeler* for the respondents. Astbury J. has held that the articles in question are fixed trade machinery which the tenant always has a right to remove during the term or within a reasonable time of its determination. That is a right of which the tenant can only be deprived by clear and unmistakable language: *Lambourn* v. *McLellan*. (1) In considering whether an article is fixed or movable you must look at the purpose for which it was erected. The primary purpose of clause 13 was to provide for the repairing of fixed machinery fences etc. It does not prohibit removal by the tenant. It applies to things which the tenant could never have the right to remove. The only point of time is the end of the term. The fixed machinery not sooner removed is to be left. There are no clear words taking away the tenant's common law right to remove during the term. It cannot be contended that if a machine were defective the tenant would have no right to remove it and replace it by a better. The clause provides that fixtures which the tenant must leave and those which he may leave must at the end of the term be left in good repair: *Sumner* v. *Bromilow* (2); *Bishop* v. *Elliott* (3); *Dumergue* v. *Rumsey*. (4)

[SCRUTTON L.J. In *Leschallas* v. *Woolf* (5) Parker J. thought that a lessee's covenant to deliver up the demised premises and all fixtures belonging thereto without more was not confined to landlord's fixtures.]

That went beyond all the decisions. The respondents are entitled to the use of the machinery during the term. The appellant is only entitled to the reversion.

(1) [1903] 2 Ch. 268, 277.
(2) (1865) 34 L. J. (Q. B.) 130.
(3) 1855) 11 Ex. 113.
(4) (1863) 2 H. & C. 777.
(5) [1908] 1 Ch. 641, 649.

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[SWINFEN EADY M.R. Where fixtures have been severed the landlord may maintain an action of trespass for the property is vested in him from the time of severance. He may also sue in trover for their value: see Woodfall on Landlord and Tenant, 19th ed., 763.]

No reply was called for.

SWINFEN EADY M.R. (after stating the facts as above set out). Clause 13 of the lease provides that the lessees shall not take away the fixed machinery—that is, the machinery which is fixed in the demised seams or on the surface. Now upon the facts this is machinery fixed on the surface.

Reference was made to *Bishop* v. *Elliott* (1) and *Dumergue* v. *Rumsey*. (2) Those were cases which depended upon the ejusdem generis rule. If you find that certain things described by particular words have some common characteristic which constitutes them a genus, then you ought to limit the general words which follow them to things of that kind. No doubt there is a rule to that effect. But here we are not embarrassed by the user of general words. We have a specific description. Then we were pressed with the rule laid down by Vaughan Williams L.J. in *Lambourn* v. *McLellan* (3), and it was said that that case laid down a definite rule for the Court to follow. I agree. Let us see what the rule was, and the terms in which "it was" laid down. Vaughan Williams L.J. said (4): "It is very desirable that we should lay down such a rule that landlords and tenants may know once for all that when a house is let to a tenant for the purposes of a trade, if the landlord wishes to restrict his tenant's ordinary right to remove trade machinery or fixtures attached to the demised premises, as these machines are, so as to be more conveniently used, and not placed there as an addition or improvement to the premises, the landlord must say so in plain language."

Now it does not appear whether the draftsman of this

(1) 11 Ex. 113.
(2) 2 H. & C. 777.
(3) [1903] 2 Ch. 268.
(4) [1903] 2 Ch. 277.

agreement of 1905 had before him at the moment he prepared it that language of Vaughan Williams L.J., but from the way in which he has expressed himself I think he may have had. Clause 13 says that "all erections fences and fixed machinery in the demised seams, or on the surface of the said premises shall be left in good repair and condition by the lessees." In other words, it provides that the tenant shall not remove his machinery fixed on the demised premises. That is said in the plainest possible way. Under these circumstances, I am of opinion that the intervention of the appellant was quite justified, and that the articles in question belong to her, and, as they have been severed and sold during the term, she is entitled to affirm the sale and to claim immediately, without waiting until the end of the term, the proceeds of the sale. Under the circumstances, we must declare that to be her right.

SCRUTTON L.J. I am of the same opinion, and as we are differing from the learned judge below, I will shortly express the reasons for the view at which I arrive. The question in this case is whether certain trade machinery on certain demised premises used for the purpose of a colliery can be removed by the lessees during the term.

I will state the rule as to trade machinery, not in my own words but in the words of Willes J. in *Climie* v. *Wood* (1): "There is no doubt that sometimes things annexed to land remain chattels as much after they have been annexed as they were before. The case of pictures hung on a wall for the purpose of being more conveniently seen may be mentioned by way of illustration. On the other hand, things may be made so completely a part of the land, as being essential to its convenient use, that even a tenant could not remove them. An example of this class of chattel may be found in doors or windows. Lastly, things may be annexed to land, for the purposes of trade or of domestic convenience or ornament, in so permanent a manner as really to form a part of the land; and yet the tenant who has erected them is entitled to remove them during his term, or, it may be, within a

(1) (1868) L. R. 3 Ex. 257; (1869) L. R. 4 Ex. 328, 329.

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reasonable time after its expiration." There appears to be no question on the facts here, and in view of the authorities, that these heavy machines, bolted to the freehold or to erections in the freehold, in order that they may run permanently without rocking, are either part of the freehold, or chattels of such a description that they would be removable under the privilege in favour of trade; but they cannot be removed if not removed before the end of the term. I agree with the argument of the respondents' counsel that inasmuch as the lease is ordinarily prepared by the landlord, and the Court looks very favourably on the exemption in favour of trade fixtures, if the landlord wishes to get rid of the common law privilege to remove trade machinery he must do so in clear terms. The question is whether in clause 13 of this lease he has done so. [The Lord Justice read the clause and continued:] I cannot read that clause in such a way as would allow the tenant to remove the fixed machinery before the end of the term. I read it in what appears to me to be the natural and only meaning of it, as providing that all fixed machinery shall be left at the end of the term in good repair and condition—which appears to me expressly to exclude the power to remove it before the end of the term.

I notice that draftsmen sometimes try to get rid of certain tenant's powers by using a multitude of words. In *Lambourn* v. *McLellan* (1), where the question was whether trade machinery could be removed, the draftsman had said that the premises were to be yielded up to the lessor "together with all doors, locks, keys, bolts, bars, staples, hinges, iron pins, wainscots, hearths, stoves, marble and other chimney pieces, slabs, shutters, fastenings, partitions, pipes, pumps, sinks, gutters of lead, posts, pales, rails, dressers, shelves, and all other erections, buildings, improvements, fixtures, and things which are now or which at any time during the said term hereby granted shall be fixed, fastened, or belong to the said messuage and premises or any part thereof"—and the one thing he had not done in that innumerable catalogue of words was to mention the machinery,

(1) [1903] 2 Ch. 268.

which was the matter in question. Under those circumstances I am not surprised that the Court said that the tenant was not deprived of his right to remove trade fixtures. If you want to get rid of the privilege to remove trade machinery you must do so in clear terms. In this case the draftsman has said in one sentence that the fixed machinery is to be left. I do not know whether counsel for the respondents object to that on the ground that it is too brief, but after the warning of danger given by the judgment in *Lambourn* v. *McLellan* (1) it seems to me that the draftsman here has taken the only proper means of ensuring that the fixed machinery in this case shall not be removed by the tenant, but shall be left at the end of the term in good repair and condition.

For those reasons, quite accepting the propositions by which counsel for the respondents started his argument, I think this clause has clearly done away with the tenant's privilege to remove trade fixtures, and for these reasons I agree with the judgment which has just been delivered by the Master of the Rolls.

EVE J. I am of the same opinion. Clause 13 in express terms applies to "all erections fences and fixed machinery in the demised seams or on the surface of the said premises" and in my opinion that language is proper to describe correctly, and does describe, the items here in dispute, and although it is true it is used in collocation with language descriptive of items prima facie landlord's fixtures, that is not, in my opinion, sufficient so to control or restrict its meaning as to exclude the items we have here to consider. I think those items, one and all of them, are covered by this clause, and that the true construction of it is reasonably plain.

Appeal allowed.

Solicitors for appellants : *Smith, Rundell & Co., for Morgan Scott & Scott, Cardiff.*

Solicitors for respondents : *Kinch & Richardson, for Lyndon, Moore & Co., Newport, Mon.*

(1) [1903] 2 Ch. 268. G. A. S.

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1919
Nov. 11.

In re WARD.

PARTRIDGE *v.* HOARE-WARD.

[1918. W. 1694.]

Will—Construction—Joint Tenancy or Tenancy in Common—Express Maintenance Clause—Income arising from "Share or Shares" of Property.

An express power conferred on trustees to apply all or any part of the "annual income arising from any property or share or shares of property" to which any minor or minors may be entitled, or presumptively entitled under the will, in or towards the maintenance or advancement of such minor or minors is a sufficient indication that the members of the class to which it applies are intended to take as tenants in common and not as joint tenants.

Dictum of Joyce J. in *In re Woolley* [1903] 2 Ch. 206, 211 followed.

ADJOURNED SUMMONS.

Sarah Ward, the testatrix, who died in 1885, by her will dated December 12, 1883, devised and bequeathed a copyhold estate in Pennyfields, Poplar, Middlesex, and also a sum of 2,000*l*., unto trustees upon trust in the events which happened for Ellen Hoare during her life and after her death in trust for all and every the brothers and sisters of Ellen Hoare living at the time of her death, "the issue of any one or more of them who shall die to take their, his, or her deceased parent's share"; and, after settling other properties or legacies in favour of other persons for their lives with remainders over, the testatrix continued: "And I further empower my trustees during the minority or respective minorities of any minor or minors interested under the trusts of this my will, and subject and without prejudice to any prior existing rights or interests, to pay or apply all or any part of the rents and profits or the dividends, interest, and annual income arising from any property or share or shares of property real or personal to which such minor or minors shall or may be entitled or presumptively or contingently entitled under or by virtue of this my will, in or towards the maintenance, education, and support, or for the preferment

or advancement in life, or otherwise for the benefit of such minor or minors respectively in such manner as my trustees shall think proper."

Ellen Hoare died in 1917. She had several brothers and sisters. One brother died in 1898, having had several children, one of whom died in 1913. One sister died in 1911, having had two children, one of whom died in 1915.

This was an originating summons taken out by the surviving trustee of the will of the testatrix, on which the Court held that the word "issue" in the trusts was restricted to children, and that the children of the brother and sister who predeceased Ellen Hoare were entitled under the trusts, notwithstanding that such children were not living at the death of Ellen Hoare. The further question was then argued whether the respective children of the deceased brother and sister took under the trusts as joint tenants or as tenants in common.

Stafford Crossman for the plaintiff trustee.

Bryan Farrer for the personal representative of the child of the deceased brother. The express power conferred on the trustees to apply the "income arising from any property or share or shares of property" during the minorities of the children for their maintenance and advancement is inconsistent with the property being held in joint tenancy and shows that the testatrix intended the children to take as tenants in common: *L'Estrange* v. *L'Estrange* (1); *In re Dunn.* (2) In each of those cases, it is true, the power was a power of advancement out of capital, but in *In re Woolley* (3) Joyce J. after deciding that the trusts of the will created a tenancy in common expressed a clear opinion that a power conferred on the trustees to maintain the beneficiaries in that case out of the income of their shares would have led him to the same result. That dictum is directly in point in the present case. To ascertain the share to which the children are entitled for the purpose of maintenance out of income no less than for the purpose of advancement out of

(1) [1902] 1 I. R. 467. (2) [1916] 1 Ch. 97.
(3) [1903] 2 Ch. 206, 211.

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capital it is necessary to segregate the share, which is inconsistent with the notion of a joint tenancy. The words "share or shares" indicate an intention to divide the property between the members of each class: *Robertson* v. *Fraser.* (1)

[Astbury J. referred to Conveyancing Act, 1881, s. 43.]

Stokes for the surviving children of the deceased brother. On the face of it the trusts create a joint tenancy, and there is nothing in the provision for maintenance or advancement out of income to show that the testatrix intended the children to take the capital as tenants in common. To maintain the minors out of the income of any property to which they are entitled or presumptively or contingently entitled is not inconsistent with a joint tenancy as regards the capital: Williams on Real Property, 21st ed., p. 136. Cases like *L'Estrange* v. *L'Estrange* (2) and *In re Dunn* (3), where the wills enabled advances to be made out of capital, are distinguishable, and the dictum of Joyce J. in *In re Woolley* (4) is obiter merely.

A. C. Nesbitt for the surviving child of the deceased sister supported the same argument. For the present purpose there is a vital distinction between a power of advancement out of capital and a power of maintenance or advancement out of income. The first involves an actual segregation; the second does not involve even a notional segregation.

R. L. Ramsbotham for other parties.

ASTBURY J. stated the facts and continued: The question is as to the nature of the interests taken by the respective issue of the brother and sister who predeceased Ellen Hoare, that is, whether such issue (who as I have already held are to be confined to children) take their deceased parent's share as joint tenants or as tenants in common. Apart from the express provision to which I am about to refer it is plain that there is nothing in the language of the trust which would prevent the children from taking their parent's share as joint tenants, but the will contains the following

(1) (1871) L. R. 6 Ch. 696.
(2) [1902] 1 I. R. 467.
(3) [1916] 1 Ch. 97.
(4) [1903] 2 Ch. 206.

express provision. [His Lordship read the maintenance clause and continued :] It is contended that the language of that clause is sufficient to show that the testatrix did not intend any minors interested under her will to take as joint tenants but intended them to take as tenants in common. No authority has been cited to me which directly covers the present case, but it has been decided that a similar power of advancement out of capital is enough to show that the objects of the power are intended to take as tenants in common, such a power being inconsistent with the notion of joint tenancy. Direct authority for that proposition is to be found in *L'Estrange* v. *L'Estrange* (1), where a testator devised the residue of his property to trustees for the benefit of his six children, with power to the trustees to advance such sums as they thought fit for their education and advancement, and the Court of Appeal in Ireland held that the advancement clause was a sufficient indication that the children were to take as tenants in common. Referring to the advancement clause in that case Lord Ashbourne C. said (2) : "It is one of those clauses of which, when read for the first time, one may not see the full effect, or ascertain how far the words will go ; but when read more closely it is clear that the words confer a power, not of maintenance, but of advancement. If a sum, perhaps of a considerable amount, were advanced for one child, it would be right to debit that sum against his or her share, and that debit could not be worked out if these children were joint tenants, and could not be done unless they were tenants in common." FitzGibbon L.J. said : "The incompatibility of a discretionary power of advancement with a joint tenancy is absolute, because the exercise of such a power implies the reduction of several parts of the property into possession. . . . . Before any advancement could be made the share of each child would have to be segregated, so that each advancement might be made, not out of the property as a whole, but only out of the share of the child who was to receive the advance. This negatives joint tenancy." That decision was followed by myself in *In re*

(1) [1902] 1 I. R. 467. (2) [1902] 1 I. R. 468, 469, 470.

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Dunn (1), where the will contained a similar power of advancement out of capital. The present case however is different, because there is no power to make advances out of capital, and the question is whether the power is so framed as to show a sufficient indication that the testatrix intended the objects to take the capital as tenants in common and not as joint tenants. In *Robertson* v. *Fraser* (2) Lord Hatherley said: "I cannot doubt, having regard to the authorities respecting the effect of such words as 'amongst' and 'respectively,' that anything which in the slightest degree indicates an intention to divide the property must be held to abrogate the idea of a joint tenancy, and to create a tenancy in common." In *In re Woolley* (3) Joyce J. said: "In a case of ambiguity the Court very properly leans to the construction which creates a tenancy in common in preference to a joint tenancy." In that case Joyce J. decided that the shares in question were given by way of tenancy in common, but by way of dictum the learned judge said that he was assisted in arriving at that conclusion by an express maintenance clause which empowered the trustees to apply the income of any share for the purpose of maintenance. "Here, moreover," he said (4), "that my reading of the words of the will in this respect must be the correct one is established by the terms of the subsequent clauses in reference to maintenance and separate use where the shares of great-grandchildren as well as of grandchildren are mentioned and referred to." I think that in that passage the learned judge meant that the power to apply the interest of their shares for the maintenance of the great-grandchildren otherwise taking as joint tenants would by itself have been sufficient indication of an intention to create a tenancy in common between them; and on the true construction of the clause in this will I have arrived at the same conclusion. It is said on the part of those interested in favour of a joint tenancy that the language of the clause is not enough to show that

(1) [1916] 1 Ch. 97.
(2) L. R. 6 Ch. 696, 699.
(3) [1903] 2 Ch. 206, 211.
(4) [1903] 2 Ch. 211.

the testatrix intended each minor to have an individual share in the capital, but it is I think rightly pointed out that in order to apply the income of the share to which a minor may be entitled there must be a segregation or notional segregation of the whole, and though the point is not altogether free from doubt, I am of opinion that there is sufficient language on this will to show that the testatrix intended each class of minors to take between themselves as tenants in common and not as joint tenants ; and I make a declaration accordingly.

Solicitors : *Horsley & Weightman, for H. and A. Maxfield, Sheffield ; Stanley Attenborough & Co. ; A. T. Lawden, for Evershed & Tomkinson, Birmingham ; Capel Cure & Ball.*

A. C.

ATTORNEY-GENERAL *v.* PARR.

[1919. A. 268.]

Church—Charity—Endowment of 1620*—Income to be received and applied by Churchwardens wholly about Parish Church—Repairs of Chancel—Applicability of Fund.*

By a trust deed of 1620 two husbandmen of Swanage granted certain lands to trustees to the sole use that the rents and profits should be received employed and bestowed by the churchwardens wholly about the parish church :—

Held, that the fact that the application of the income was placed in the hands of the churchwardens who, to the grantors' knowledge, were not concerned with chancel repairs which fell on the rector as owner of the great tithes, was not enough to show that the income was only given in aid of church rates or other parochial purposes with which the churchwardens were directly concerned; it was applicable to general expenditure about the church as a whole including repairs of the chancel.

Rippin v. *Bastin* (1869) L. R. 2 A. & E. 386 and *Smallbones* v. *Edney* (1870) L. R. 3 P. C. 444 applied.

Rumball v. *Munt* (1846) 8 Q. B. 382, *Rogers* v. *Davenant* (1677) 1 Mod. 236, and *St. Mary Magdalen, Bermondsey* (1677) 2 Mod. 222, distinguished.

ACTION.

By a trust deed dated June 1, 1620, and made between

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Farr and Spear of Swanage (therein called Swanwick), husbandmen of the one part and ten trustees of the other part, it was witnessed that Farr and Spear for the special trust and confidence which they had and reposed in the trustees and for the zeal which they bare unto Almighty God and the parish church of Swanage granted certain lands to the trustees and their heirs to the sole only and proper use that all the rents and profits arising therefrom from time to time should be "received employed and bestowed by the churchwardens of the parish of Swanage aforesaid for the time being wholly about the parish church of Swanage by the consent of" the trustees or the major part of them. It was provided that on every Easter Monday the churchwardens should pass an account before the trustees of their receipts for the year and their expenditure "in upon or about the said parish church of Swanage," and should deliver up any unexpended balance to the new churchwardens.

The lands were sold in 1885 and at the date of the scheme of 1888 below stated, the endowment of the charity called "The Swanage Church Lands Charity" consisted of 7141*l.* consols held by the Official Trustees of Charitable Funds.

On November 2, 1888, the Charity Commissioners, on the application of a majority of the trustees, made a scheme for the future regulation of the charity, which was to be administered by ten trustees.

The scheme provided (inter alia) as follows :—

Clause 13 : "In order to accumulate a fund, to be from time to time applied in or towards defraying the cost of any extraordinary repairs or the improvement or enlargement of the fabric of the parish church of Swanage, the Official Trustees of Charitable Funds shall forthwith transfer to a separate account, to be entitled the 'Investment (Repair Fund) Account,' the sum of 1700*l.*, two and three-quarters per cent. consolidated stock, part of the sum of 7141*l.* 13*s.* 4*d.* like stock, now held by them in trust for the charity, and shall, from time to time, as the same shall accrue, invest the dividends upon the sum of stock standing to the credit of the said account at compound interest, in the purchase,

in their name, of like stock in trust for the charity, to the credit of the same account until the sum of stock standing to the credit of the account shall amount to the sum of 2200*l.* stock.

"Subject to the foregoing direction, the said dividends shall be paid or remitted by the Official Trustees unto the trustees for the time being of the charity or any one or more of them or unto the person or persons who shall, for the time being, be authorized by the trustees to receive the same, upon their or his receipt, to the intent that the same may be applied to the purposes of the charity."

Clause 14: "Subject as aforesaid, and to the payment of all proper costs, charges, and expenses of and incidental to the administration and management of the charity, the yearly income thereof shall be applied by the trustees as follows:—

"(*a*) In contributing annually a sum of not more than 60*l.* in or towards the payment of the salary of any clerk in Holy Orders who may be duly licensed by the Ordinary to officiate as assistant curate in the said parish church, and

"(*b*) In the payment to the churchwardens of the parish of Swanage of any charges lawfully incurred by them in the maintenance (including insurance against loss or damage by fire), and current repair of the fabric of the parish church, and subject thereto, in the payment of the like charges in respect of the maintenance of the services of the said church, and of the ornaments, utensils, and furniture thereof. If, in any year, the whole of such yearly income be not so applied as aforesaid, any moneys remaining undisposed of may be applied in defraying the cost of any extraordinary repairs, improvement, or enlargement of the fabric of the said church, or if in any year not required to be so applied, shall be invested and accumulated by the trustees in the public funds. When the fund so to be accumulated shall amount to or exceed 50*l.* stock, the same shall

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be invested in, or transferred to, the name of 'The Official Trustees of Charitable Funds,' in trust for the charity."

Clause 17: "If any doubt or question shall arise amongst the trustees, or any of them, as to the construction or proper application of any of the provisions of this scheme, or the management of the charity, application may be made by them to the Charity Commissioners for their opinion and advice, which when given shall be conclusive upon all persons claiming affected thereby."

The sum of 2200*l.* consols for the "Investment (Repair Fund) Account" had long since been made up and there were additional accumulations of income to more than 1000*l.* represented by 800*l.* War Bonds and 200*l.* cash on deposit. The total amount of consols including the 2200*l.* was 7641*l.* consols.

The chancel being in need of substantial repair, the question arose whether chancel repairs fell within the purview of the charity. The rector and churchwardens and two of the present eight trustees took the view that chancel repairs were within the trust. The remaining six trustees took the contrary view. The matter was laid before the Charity Commissioners, who, after some correspondence, certified it to the Attorney-General.

On March 21, 1919, the Attorney-General commenced this action against the rector and churchwardens and the trustees to determine the point.

The minutes of the trustees' meetings showed occasional expenditure on chancel repairs. On the other hand a vestry minute of April 30, 1792, contained a resolution that application be made to the rector to repair the chancel agreeably to a plan dealing with repairs of the whole church.

Edward Beaumont for the Attorney-General.

Sheldon for the rector and churchwardens. I admit that by the law or custom of England the rector is liable for the repairs of the chancel and the parishioners through the churchwardens for the repairs of the rest of the church:

Burn's Ecclesiastical Law, 9th ed., vol i., p. 350; *Pense* v. *Prouse*. (1) But that is not enough to show that the income of this fund was not given in aid of both liabilities. The churchwardens, though not charged with the repairs of the chancel, had duties of supervision over it and could make presentments of non-repair, and the mere fact that they were the persons to receive and apply the income in, upon or about the church did not confine the application to church rates or other parochial purposes.

In its ordinary sense the word "church" includes the chancel: *Rippin* v. *Bastin* (2); and both in that case and in *Smallbones* v. *Edney* (3) it was held that money borrowed by the churchwardens and overseers under 5 Geo. 4, c. 36, for repairing a church might be partly expended in repairing the chancel, and consequently that the rector or impropriator of great tithes though exempt from ordinary church rate was liable to a special rate levied for repayment of the statutory loan.

Errington for the majority of the trustees. The repairs of the chancel fall on the rector as owner of the great tithes, and not on the churchwardens who have no funds for that purpose. In 1620 the churchwardens, who were elected annually at the Easter Monday vestry meeting, were responsible for church rate and poor rate, and the plain object of the deed of 1620 was to give them the income for church purposes only—i.e., in aid of the church rate. The grantors, as husbandmen, were thoroughly conversant with the situation. They were constantly assessed to church rate for church repairs, and had to pay tithes to the rector who alone was liable to repair the chancel. The respective liabilities were a constant source of dispute. A church rate levied for chancel repairs would at once have been appealed against, and nothing would have created more friction than a gift for repairs of church and chancel. It was necessary to convey the lands to trustees or feoffees because the churchwardens were not a corporation. But if it had conceivably been

(1) (1695) 1 Ld. Raym. 59. (2) L. R. 2 A. & E. 386, 389.
(3) L. R. 3 P. C. 444.

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intended to benefit the rector who in those days was considered one of the rich men of the parish the lands could have been conveyed to him as a corporation sole, and the perpetual expense of appointing new trustees avoided.

[ASTBURY J. If you are right how can the scheme give 60*l.* a year to a curate ? That is not a parochial expense.]

The large income was probably considered about 60*l.* in excess of parochial requirements, and this surplus was properly applied cy-près. The rest of clause 14 directs the payment of "charges lawfully incurred by" the churchwardens in the maintenance and current repair of the fabric, services, ornaments, utensils and furniture. This is merely an enumeration of their ordinary duties and would not include chancel repairs. They could not repair the chancel without the rector's consent, even if they had funds for that purpose. The extraordinary repairs—i.e., repairs other than current repairs—must be similarly limited, and the same limitation must be applied to the extraordinary repairs mentioned in clause 13.

In ordinary parlance church of course includes chancel. But the context and circumstances must always be considered particularly in construing an ancient document. For instance church rates were always levied for the repair of the church eo nomine, but in that context church or ecclesia did not include chancel : Burn's Ecclesiastical Law, 9th ed., vol. i., p. 385; *Rogers* v. *Davenant* (1); *St. Mary Magdalen, Bermondsey.* (2) In the case of the 5 Geo. 4, c. 36, which authorized loans for rebuilding, repairing, enlarging or otherwise extending the accommodation in the church the special rate was really in the nature of a poor rate to be levied by the churchwardens and overseers, and on the construction of that Act it was held that church included chancel : *Rippin* v. *Bastin* (3) ; *Smallbones* v. *Edney.* (4) There is no such context in the deed of 1620 and the circumstances strongly militate against any such extended

(1) 1 Mod. 236.
(2) 2 Mod. 222.
(3) L. R. 2 A. & E. 386.
(4) L. R. 3 P. C. 444.

construction. In *Rumball* v. *Munt* (1), it was held that a trust for the repair of the church and benefit of the parish was a parochial charity, and on that point the case has never been questioned. The vestry minutes so far as they go show that the vestry looked upon the fund as a parish fund, and the fact that in the past the trustees occasionally applied income in chancel repairs does not make such an application legal.

ASTBURY J. This is an action by the Attorney-General to determine the true construction and ambit of an old trust of 1620 and a scheme of 1888. [His Lordship read the trust deed of 1620.] The question is whether under this trust and under the scheme sanctioned in pursuance thereof, the trust income is applicable (inter alia) for the repair of the chancel as well as the rest of the church.

The rector by common law or custom apart from this trust is responsible for the repair of the chancel; the parishioners through the churchwardens for the repair of the rest of the church. There is a division of opinion among the trustees; and it is necessary to decide whether the application of the income is confined to strictly parochial purposes, or whether it can be used generally for the benefit of the church as a whole. [His Lordship read clauses 13 and 14 of the scheme.]

Mr. Errington, who appears for the majority of these trustees, contends (and there is much to justify his contention) that the real limit of the trust in the old deed is to be found in the fact that the income is payable only to the churchwardens to be by them employed about the church; he says that they are the people to do the parochial work of the church, and that they have no concern with keeping the chancel in repair, and as the document merely hands over this annual fund to the churchwardens, he contends that it is so handed over in relief only of church rates and for parochial purposes.

If that is the true construction of this document, the scheme

(1) 8 Q. B. 382, 392.

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is pro tanto ultra vires because, subject to setting aside the 2200*l.* consols for extraordinary repairs, the first payment to be made out of the income under clause 14 is 60*l.* a year to the curate, which is not a parochial expense for which the church-wardens are in any way responsible. But on the whole I do not think that this is the true meaning of the document. There may be considerable doubt as to what the donors really intended, but the trust as it stands is for the expenditure of the income of the fund "about the parish church," or, as stated in another part of the deed, "in upon or about the said parish church." I see no ground for holding that the donors by the use of the expression "parish church" did not mean the church as a whole. It is quite true they may have intended to give this fund solely in aid of church rates, and Mr. Errington says that in those times there was a good deal of contest in many parts of this country between rectors and parishioners as to their respective obligations; but whether that is so or not there is no sufficient certainty that those general and wide words were intended to be limited to parochial expenditure as distinct from general expenditure in and about the church.

In support of his contention Mr. Errington relied on *Rumball* v. *Munt* (1), but there the words were very different. The trust was for the repair of the parish church, and for the benefit of the parish, and the Court held that on the whole the trust was entirely parochial. In the present case there is no such limitation. Application of the money is not limited to repairs nor is it limited to any application that will benefit the parishioners. For that reason the case is distinguishable.

The word "church" both in its ordinary meaning and also in connection with repairs authorized by 5 Geo. 4, c. 36, includes the chancel: *Rippin* v. *Bastin* (2); *Smallbones* v. *Edney*. (3)

A number of minutes of the trustees and of the vestry have been referred to. The trustees' minutes show past

(1) 8 Q. B. 382, 392. (2) L. R. 2 A. & E. 386, 389.
(3) L. R. 3 P. C. 444.

expenditure of the trust income on the chancel, but it is very difficult to draw any definite conclusion from the vestry minutes. There is some ground for believing that in 1792 the vestry were of opinion that the rector was liable to repair the chancel. Nothing that I have held on the construction of the trust deed conflicts with that view. The rector was liable then and he is liable now under his common law liability to keep the chancel in repair if and so far as the funds are not applied by the trustees for that purpose.

Mr. Errington has very properly referred to *Rogers* v. *Davenant* (1) and *St. Mary Magdalen, Bermondsey* (2), where, in connection with the levying and validity of church rates, the Court put a construction upon the word "ecclesia" or "church." That was the ordinary technical construction, expressly having regard to the common law liability to repair, but I do not think it really applies to the general construction of the words in a trust of this character.

In coming to this conclusion I am largely influenced by the fact that in 1888 the Charity Commissioners sanctioned a scheme which, if the limited construction is the true one, cannot I think have been valid.

I am of opinion that the income of the trust funds under the deed, and under the scheme, is applicable inter alia for the repair of the fabric of the church, including the chancel, and the parties have wisely, and rightly, agreed that the words "extraordinary repairs" under the scheme mean such repairs to the fabric of this building as are not included in the ordinary current repairs.

Solicitors: *Treasury Solicitor; Rawle, Johnstone & Co., for J. R. Slade, Swanage; Robbins, Olivey & Lake.*

(1) 1 Mod. 236. (2) 2 Mod. 222.

G. R. A.

C. A.
1920
Jan. 13, 14.

MARKWALD *v.* ATTORNEY-GENERAL.

[1918. M. 370.]

Alien—German-born Subject—Naturalization in Australia—Oath of Allegiance—Status in United Kingdom—Naturalization Act, 1870 (33 & 34 *Vict. c.* 14), *ss.* 7, 16—*Commonwealth of Australia Constitution Act*, 1900 (63 & 64 *Vict. c.* 12), *Sched., art.* 51 (*xix.*)—*Commonwealth of Australia Naturalization Act*, 1903 (*No.* 11 *of* 1903), *ss.* 5, 7, 8—*British Nationality and Status of Aliens Act*, 1914 (4 & 5 *Geo.* 5, *c.* 17), *s.* 27, *sub-s.* 1.

By art. 51 of the Constitution scheduled to the Commonwealth of Australia Constitution Act, 1900, the Commonwealth Parliament was empowered to make laws (inter alia) with respect to "(xix.) Naturalization and aliens." In pursuance of those powers the Commonwealth Parliament passed the Naturalization Act, 1903, which, by s. 7, empowers the Governor-General in Council to grant a certificate of naturalization to an alien under certain conditions, provided that he shall not issue such a certificate until he has received from the applicant a certificate from one of the officers therein mentioned that the applicant has before him taken an oath or affirmation of allegiance in the form in the schedule to the Constitution. By s. 8 "A person to whom a certificate of naturalization is granted shall in the Commonwealth be entitled to all political and other rights powers and privileges and be subject to all obligations to which a natural-born British subject is entitled or subject in the Commonwealth."

A natural-born German subject left Germany in 1878 and went to Australia, where, in 1908, he took the oath of allegiance to His Majesty and was granted under the powers of the Naturalization Act, 1903, a certificate of naturalization by which he became entitled to all political and other rights, powers, and privileges to which a natural-born British subject is entitled in the Commonwealth He subsequently became a resident in London and was charged and convicted for that, being an alien, he had failed to furnish to a registration officer the particulars required by the Aliens Restriction (Consolidated) Order, 1916, and his conviction was afterwards upheld by a Divisional Court: *Rex* v. *Francis. Ex parte Markwald* [1918] 1 K. B. 617. In an action brought by the plaintiff against the Attorney-General for a declaration that he was no alien in England, but a liege subject of His Majesty the King, and entitled to the protection of His Majesty the King in all parts of His Majesty's Kingdom and Dominions:—

Held (affirming the decision of Astbury J.), that neither the taking of the oath of allegiance alone, nor the taking of the oath coupled with the grant of the certificate in Australia, made the plaintiff a British subject in the United Kingdom, and that he was, therefore, an alien when in the United Kingdom, and that the declaration must be refused.

Grounds of the judgments of the Divisional Court in *Rex* v. *Francis. Ex parte Markwald* [1918] 1 K. B. 617 approved.

Calvin's Case (1608) 7 Rep. 1*a* distinguished.

Per Younger L.J., that the plaintiff was at least to this extent to be regarded as an alien, that he was a person so described in the British Nationality and Status of Aliens Act, 1914, and for the purposes of that Act. He was a person entitled under that Act to apply as an alien for and to have granted to him in the United Kingdom a certificate of naturalization.

APPEAL from a decision of Astbury J.

The action was brought by the plaintiff, a German by birth but naturalized in the Commonwealth of Australia, against the Attorney-General for a declaration "that he is no alien in England but a liege subject of His Majesty the King, and entitled to the protection of His Majesty the King in all parts of His Majesty's Kingdom and Dominions."

The question mainly turned on the construction of the British and Commonwealth of Australia Naturalization Acts, the material provisions of which were the following :—

By the Naturalization Act, 1870 (33 & 34 Vict. c. 14), s. 7, an alien who fulfilled certain conditions which were therein mentioned might apply to one of Her Majesty's Principal Secretaries of State for a certificate of naturalization, and "the said Secretary of State, if satisfied with the evidence adduced, shall take the case of the applicant into consideration, and may, with or without assigning any reason, give or withhold a certificate as he thinks most conducive to the public good, and no appeal shall lie from his decision, but such certificate shall not take effect until the applicant has taken the oath of allegiance." The third paragraph of the section further provided that "An alien to whom a certificate of naturalization is granted shall in the United Kingdom be entitled to all political and other rights, powers, and privileges, and be subject to all obligations, to which a natural-born British subject is entitled or subject in the United Kingdom. . . . ." By s. 16 "All laws, statutes, and ordinances which may be duly made by the legislature of any British possession for imparting to any person the privileges, or any of the privileges, of naturalization, to be enjoyed by such person within the limits of such possession, shall within such limits have the authority of law, but shall be subject to be confirmed or disallowed by Her Majesty in the same manner,

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and subject to the same rules in and subject to which Her Majesty has power to confirm or disallow any other laws, statutes, or ordinances in that possession." By s. 17 "'British possession' shall mean any colony, plantation, island, territory, or settlement within Her Majesty's dominions, and not within the United Kingdom, and all territories and places under one legislature are deemed to be one British possession for the purposes of this Act."

So the law as to colonial naturalization remained unti the passing of the Commonwealth of Australia Constitution Act, 1900 (63 & 64 Vict. c. 12), which established the constitution of the Commonwealth of Australia. By art. 51 of the Constitution, which is scheduled to the Act, the Commonwealth Parliament is empowered to make laws (inter alia) with respect to "(xix.) Naturalization and aliens."

In pursuance of those powers the Commonwealth Parliament passed the Naturalization Act, 1903 (No. 11 of 1903). By s. 5 of that Act "A person resident in the Commonwealth, not being a British subject, and not being an aboriginal native of Asia, Africa, or the Islands of the Pacific, excepting New Zealand, who intends to settle in the Commonwealth, and who—(*a*) has resided in Australia continuously for two years immediately preceding the application; or (*b*) has obtained in the United Kingdom a certificate of naturalization or letters of naturalization, may apply to the Governor-General for a certificate of naturalization." By s. 7: "The Governor-General in Council, if satisfied with the evidence adduced, shall consider the application, and may, with or without assigning any reason, in his discretion grant or withhold a certificate of naturalization as he thinks most conducive to the public good. Provided that in the case of an applicant, who has not obtained in the United Kingdom a certificate of naturalization or letters of naturalization, the Governor-General shall not issue the certificate until he has received from the applicant the certificate of a Justice of the High Court, of a Judge of a Court of a State, or a Police, Stipendiary, or Special Magistrate, that the applicant has before him

taken an oath or affirmation of allegiance in the form in the Schedule to the Constitution" (see Commonwealth of Australia Constitution Act, 1900, sched.). By s. 8 "A person to whom a certificate of naturalization is granted shall in the Commonwealth be entitled to all political and other rights powers and privileges and be subject to all obligations to which a natural-born British subject is entitled or subject in the Commonwealth. Provided that where by any provision of the Constitution or of any Act or State Constitution or Act a distinction is made between the rights powers or privileges of natural-born British subjects and those of persons naturalized in the Commonwealth or in a State, the rights powers and privileges conferred by this section, shall for the purposes of that provision be only those (if any) to which persons so naturalized are therein expressed to be entitled."

In 1914 the British Nationality and Status of Aliens Act, 1914 (4 & 5 Geo. 5, c. 17), consolidated and amended the enactments relating to British nationality and the status of aliens. By s. 3, sub-s. 1, of that Act "A person to whom a certificate of naturalization is granted by a Secretary of State shall, subject to the provisions of this Act, be entitled to all political and other rights powers and privileges, and be subject to all obligations, duties, and liabilities, to which a natural-born British subject is entitled or subject, and, as from the date of his naturalization, have to all intents and purposes the status of a natural-born British subject." Sect. 8, sub-s. 1, empowers the Government of any British Possession to grant a certificate of Imperial naturalization, and sub-s. 2 provides that "Any certificate of naturalization granted under this section shall have the same effect as a certificate of naturalization granted by the Secretary of State under this Act." Sect. 9, sub-s. 1, provides: "This Part of this Act shall not, nor shall any certificate of naturalization granted thereunder, have effect within any of the Dominions specified in the First Schedule to this Act"—which includes the Commonwealth of Australia—"unless the Legislature of that Dominion adopts this Part of this Act." By

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s. 27, sub-s. 1: "In this Act, unless the context otherwise requires—The expression 'British subject' means a person who is a natural-born British subject, or a person to whom a certificate of naturalization has been granted: The expression 'alien' means a person who is not a British subject: The expression 'certificate of naturalization' means a certificate of naturalization granted under this Act or under any Act repealed by this or any other Act. . . . ."

The plaintiff left Germany in 1878 and went to Australia, where, in 1908, he took the oath of allegiance to His Majesty, and was granted, under the powers conferred by the Australian Naturalization Act, 1903, a certificate of naturalization, by which he became entitled to all political and other rights, powers, and privileges to which a natural-born British subject is entitled in the Commonwealth. In the same year he left Australia and came to England, where he had since resided.

In 1916 he was charged and convicted at the Westminster Police Court for that, being an alien, he had failed to furnish to a registration officer the particulars required by the Aliens Restriction (Consolidated) Order, 1916. He subsequently obtained a rule nisi calling upon the metropolitan police magistrate to show cause why he should not state a case for the opinion of the Court. On the argument of the rule the Divisional Court (Darling, Bray, and A. T. Lawrence JJ.) held that the taking of the oath of allegiance, and the grant of the certificate of naturalization in Australia, did not make the plaintiff a British subject in the United Kingdom, and that he was therefore an alien when in the United Kingdom, and that the conviction was right. (1)

In 1918 the plaintiff commenced the present action.

Astbury J. held that the decision of the Divisional Court, whether it amounted to a matter of res judicata or not in the strict sense, was a decision on the very point raised before him, and therefore he would follow it. He accordingly dismissed the action.

The plaintiff appealed. The appeal was heard on January

(1) *Rex* v. *Francis. Ex parte Markwald* [1918] 1 K. B. 617.

13, 14, 1920. It was assumed for the purposes of the case that according to German law the plaintiff, by becoming naturalized in Australia, had lost his German nationality.

Upjohn K.C. and *E. A. Harney* for the appellant. The naturalization of the appellant in Australia under the Australian Naturalization Act, 1903, involved the taking by him as a condition precedent to obtaining the certificate of naturalization, an oath of allegiance to the King, his heirs and successors in title. It is submitted that the taking of that oath in Australia by the appellant and its acceptance by the King through his duly authorized officer, the Governor-General, constituted a link between the King and the appellant which imposed upon the King the duty of protection and upon the appellant the duty of faithfulness. As was said, "protectio trahit subjectionem, et subjectio protectionem." The relationship thereby established was not confined to any particular place, but was worldwide and constituted the appellant a British subject in all parts of the King's dominions. Naturalization in Australia coupled with the oath of allegiance prevents the appellant from being an alien in this country, although it does not give him the political rights or subject him to the obligations within the United Kingdom which attach to naturalization in the United Kingdom. For example, it does not give him the right to be placed on the list of voters. The position rests upon the strict interpretation of the doctrine of allegiance established in *Calvin's Case.* (1) That doctrine is that allegiance is a personal relationship between the King in his natural capacity and the subject and extends to all places where the King is King. Although when the appellant leaves Australia and comes to England or goes to South Africa or India he does not carry with him the whole of the status he acquired in Australia by his Australian naturalization, yet he does carry with him that part of it which is implied in the term allegiance, and a person who owes allegiance to the King and is therefore, in accordance with well-settled authorities,

(1) 7 Rep. 1*a*.

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entitled to the protection of the King, cannot be an alien. The acceptance of the oath of allegiance makes the person taking it a non-alien, as is shown by the resolutions of the Lord Chancellor and twelve judges in *Calvin's Case.* (1) Allegiance when once created by the oath given and accepted is an allegiance to the King, not as King of Australia, but supreme over the whole Empire as one Empire. This point appears to be involved in and decided by *Calvin's Case.* (1) It was there held in James I.'s reign, when England and Scotland were two distinct Kingdoms, each with its own code of laws, that there was but one allegiance to one King, and therefore a Scottish-born subject of the King was no alien : see per Farwell J. in *In re Johnson* (2) and per Atkin J. in *Gavin, Gibson & Co. v. Gibson.* (3) The allegiance is no ligeantia localis but is ligeantia legalis. The dicta in *Calvin's Case* (1), which were dissented from in *In re Stepney Election Petition* (4), are not material to the present case.

We accept the decision of the Divisional Court in *Rex* v. *Francis* (5) that the onus is on the appellant to prove that he is not an alien. It is submitted therefore that having regard to ss. 7 and 16 of the Naturalization Act, 1870, it is impossible to say that a person who enjoys the position of a British subject political and otherwise in a British colony can be an alien in the United Kingdom. The appellant, therefore, being a British subject in Australia with all the full rights of one, is not an alien in England. He is within the allegiance of the British King within all his dominions and cannot be an alien in any one of them. The appellant is therefore entitled to the declaration he claims. [They also referred to *Ex parte Weber.* (6)]

Sir Gordon Hewart A.-G. and *Austen-Cartmell* for the Crown. This is really an application for a declaration at large and ought not to be granted : *Dyson* v. *Attorney-General* (7) ; *Flint* v. *Attorney-General.* (8) We do not, however, desire to press the objection.

(1) 7 Rep. 1*a*.
(2) [1903] 1 Ch. 821, 833.
(3) [1913] 3 K. B. 379, 388.
(4) (1886) 17 Q. B. D. 54, 59.
(5) [1918] 1 K. B. 617.
(6) [1916] 1 A. C. 421.
(7) [1911] 1 K. B. 410.
(8) [1918] 2 Ch. 50.

The cases cited on behalf of the appellant were cases of natural-born British subjects and have therefore no application to the present case. The matter depends entirely upon statute. It is manifest that it was the clear intention of the Legislatures both of this country and of the Commonwealth of Australia that the operation of the certificate of naturalization granted in Australia should be confined to that country.

By s. 27, sub-s. 1, of the British Nationality and Status of Aliens Act, 1914, the expressions "British subject," "alien," and "certificate of naturalization" are defined. Taking those expressions in their logical order a "certificate of naturalization" means "a certificate of naturalization granted under this Act or under any Act repealed by this or any other Act." "British subject" means "a person who is a natural-born British subject, or a person to whom a certificate of naturalization"—and that does not include a colonial certificate—"has been granted." Then "alien" is defined to mean "a person who is not a British subject." A colonial certificate is not within the Act. The appellant's certificate of naturalization was not granted to him under s. 8 of the Act of 1914, which empowers the Governments of British possessions to grant certificates of Imperial naturalization. The Act is a consolidating Act, and s. 27 is vital on the point which the Court has to consider. The short answer to the present application is that the only ground on which the appellant can claim to be a British subject is a statutory right, and that right he does not possess. There is no ground for the suggestion that there is a third position or status between that of an alien and that of a British subject. It would be a strong thing for a colony to say that a person should be a British citizen within the United Kingdom or vice versa. On this ground alone it is submitted that the decision of the judge in the Court below was right.

Further, the case of the appellant was rested on the oath of allegiance taken by him. But persons who are not British subjects may take the oath. "If an alien friend comes into England when he is an infant, and always after for a

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long time continues here, and is sworn to the King, yet he continues an alien": Vin. Abr. (1791), vol. ii., "Alien," p. 265. An oath of allegiance does not affect a man's status; it merely consecrates the status already existing. Residence of a foreigner in this country puts him under allegiance to the King, but it does not make him a British subject: *Schaffenius* v. *Goldberg*. (1) By taking the oath a man does not change his status. He remains an alien, though not an enemy alien.

Upjohn K.C. in reply. Under s. 7 of the Naturalization Act, 1870, the certificate of naturalization is not to take effect until the applicant has become one of the King's liege subjects, and that he can only do by taking the oath of allegiance. The Crown are therefore wrong in saying that an oath adds nothing to the matter. When once the position of King and liege subject is arrived at that position is universal. It was contended that the allegiance in this case was local. But that is contrary to the fundamental idea of allegiance: Piggott on Nationality, Part I., p. 78. All that I am contending for is that the King, by accepting the oath of allegiance, may relieve a man from his incapacity as an alien. The subject of "liegeance" is dealt with in 1 Co. Litt. 129*a*, where Coke, commenting on Littleton, says: "But the king may make a particular denization."

Sect. 8 of the Naturalization Act, 1903, deals exclusively with the effect of an Australian certificate of naturalization. It does not purport to deal with the subject of allegiance. All through the Naturalization Acts there are to be found provisions that before the certificate can become effective the applicant must take an oath of allegiance: see Naturalization Act, 1844 (7 & 8 Vict. c. 66), s. 10; Act of 1870, ss. 7, 8, 9; Act of 1914, s. 2, sub-s. 4; s. 9, sub-s. 2, s. 19.

The Act of 1914 is not retrospective. The appellant's rights arose in 1908. He was then naturalized in Australia, and in that year became resident in England. There is nothing in that Act which takes away from him the status which he had on the day when it was passed. To say that because the Act gives him a right to apply for more extended

(1) [1916] 1 K. B. 284.

rights it takes away from him the rights that he already has is a non sequitur. Sect. 27 is therefore irrelevant to the claim made by the appellant in this action.

LORD STERNDALE M.R. This is an appeal from a decision of Astbury J. refusing to make a declaration for which the appellant asked, "that he is no alien in England but a liege subject of His Majesty the King and entitled to the protection of His Majesty the King in all parts of His Majesty's Kingdom and Dominions." Astbury J. decided upon the authority of the grounds given by the Divisional Court for their decision in *Rex* v. *Francis. Ex parte Markwald* (1), to which I shall refer, and in effect this appeal is an appeal against the reasoning and the grounds given by the members of the Divisional Court for their judgment, although perhaps not an appeal from their actual decision.

The point that this is not a proper case for the Court to make a declaration in the exercise of its discretion as against the Attorney-General has not been taken. The Attorney-General said that he preferred not to take it, considering the nature of the case. There is no doubt now that actions can be brought for declarations, and the Court can make declarations although no consequential relief is asked. That was so decided by *Dyson* v. *Attorney-General* (2); *Burghes* v. *Attorney-General* (3); and *Guaranty Trust Co. of New York* v. *Hannay & Co.* (4) It is a very useful jurisdiction, and especially so in cases of a commercial character; but it does not at all follow that a declaration ought to be made in all cases. I think, speaking for myself, that there has been too great a tendency of late years to ask for declarations on every possible point. I have considerable doubts whether this was a case in which a declaration ought to have been made as a matter of discretion, even assuming the appellant to be correct in his contention. As I say, the point was not taken, and therefore I only wish to say that I must not be taken as giving an opinion that this was a proper case in which

(1) [1918] 1 K. B. 617.
(2) [1911] 1 K. B. 410.
)3) [1912] 1 Ch. 173.
(4) [1915] 2 K. B. 536.

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Lord Sterndale M.R.

to make such a declaration. As I think, however, on other grounds, that a declaration ought not to be made it is not necessary for me to consider that point, but I wish to guard myself by saying this, that I am not at all sure that a Court is bound to make a declaration in what it does not think a proper case merely because the point is not taken by the defendant to the action.

This case arises in these circumstances. The appellant was born in Berlin in 1859, and left Germany in or about the year 1878. I do not know where he went to first, but in 1881 he went to Australia. From that date up to the present time I think I may say that he did not return to Germany except for short visits to see his parents and friends in that country. He never took up his residence in Germany again, and I will assume that by reason of that absence, only interrupted in the way I have mentioned, he ceased to be of German or Prussian nationality. I do not decide the point as it is not necessary to do so in this case. I understand the question may be raised and come before this Court in another case, and therefore I will do no more than assume it for the present purpose.

In 1908 the appellant was naturalized in Australia, and in the same year he came to England, where he has since resided. In 1917 he was prosecuted for failing to register under the Aliens Restriction (Consolidated) Order, 1916, and was convicted. (1) The magistrate who convicted him was asked to state a case but he declined to do so. He had found that the appellant had not, as he was bound to do by s. 1, sub-s. 4, of the Aliens Restriction Act, 1914, satisfied him that he was not an alien, and it may be that he considered it only a question of fact. A rule was then obtained calling upon the magistrate to state a case for the opinion of the Court. He made an affidavit setting out what he had done, and on the argument of the rule it was agreed that the case should be dealt with as though the magistrate had stated a case and the argument proceeded on that footing. The Divisional Court discharged the rule, and in doing so they

(1) See *Rex* v. *Francis. Ex parte Markwald* [1918] 1 K. B. 617.

gave reasons for their judgment which, as I have said before, are challenged on this appeal. I do not think it necessary at the moment to say what those reasons were but I shall refer to them later.

The argument for the appellant is that either by the effect of the certificate of naturalization which he obtained in Australia of itself, or by the effect of that certificate coupled with the oath of allegiance which he had to take as a condition of obtaining the certificate—or perhaps, as the third case, by virtue of the oath of allegiance alone without the certificate—he had ceased to be an alien within Great Britain. What exactly he was I have not been able to ascertain. I have asked once or twice what he was positively but I have not been able, I will not say to get a clear answer, but to form any clear idea in my own mind as to what it was said he was. At any rate, it is said he was not an alien. I think it was expressed that he was a liegeman of the King.

In order to see what his position was one has to look at the legislation under which these proceedings were taken By the British or Imperial Statute of 1870—the Naturalization Act, 1870—it was provided by s. 7 as follows. [His Lordship read the material parts of the section and s. 16 and continued :] Therefore the scheme of the Act is this : The Secretary of State in this country may grant a certificate of naturalization which will give the rights, powers, privileges and obligations of a natural-born British subject within the United Kingdom to any person to whom he thinks such a certificate should be granted if he takes an oath of allegiance, and a British possession may make laws by which those same powers, privileges, and obligations may be conferred within that possession upon certain persons ; but the certificate of naturalization given by the Secretary of State in the United Kingdom shall not affect the position or status of the person so far as those privileges are concerned in the British possession, nor shall a certificate if granted by anybody in the British possession affect the status so far as regards those powers, privileges and obligations within the United Kingdom.

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In 1900 there was passed an Act constituting the Commonwealth of Australia which I need not refer to in detail. In 1903 there was passed an Australian Naturalization Act (No. 11 of 1903) which contains the following provisions. It provides by s. 5 that an application may be made by "a person resident in the Commonwealth, not being a British subject, and not being an aboriginal native of Asia, Africa, or the Islands of the Pacific, excepting New Zealand" for a certificate of naturalization. Then s. 7 provides [His Lordship read the first paragraph of the section and continued:] Then follows a proviso which it is not necessary to read. In s. 8 the effect of the certificate of naturalization is stated: "A person to whom a certificate of naturalization is granted shall in the Commonwealth be entitled to all political and other rights powers and privileges and be subject to all obligations to which a natural-born British subject is entitled or subject in the Commonwealth." It is also provided that that person must take the oath of allegiance. I said that I need not read the proviso to s. 7, but the last part of it I must read. It provides that there shall be a certificate of a Justice of the High Court or other authority: "that the applicant has before him taken an oath or affirmation of allegiance in the form in the Schedule to the Constitution." That is in the usual form of an oath of allegiance, and I need not read it. I will take it that the appellant did take that oath of allegiance. There appears to have been some doubt on that point before Astbury J., but no question was raised with regard to it in this Court by the Attorney-General. Certain documents were produced before us which I think do show that he took the oath, although I must say the form of them is not very satisfactory, because the certificate that was sent over here to us contains as the oath which the appellant took an oath of allegiance to King George 5 in 1908 when King George 5 was not King of Great Britain at all, but our late lamented monarch King Edward 7 was. I do not know how that mistake arose, or how they came to send over a certificate of this kind, but I do not think anything turns upon it, and

I shall assume that the appellant did take the oath of allegiance as required.

Upon those facts, as I have said, an argument has been founded that either by the effect of the certificate of naturalization or of the oath of allegiance, or of the two combined, the appellant has ceased to be an alien. I think it is quite clear that he has not so ceased by reason of the certificate of naturalization. It seems to me to be hardly arguable, and, indeed, although it was argued, that was not the point upon which the greatest stress was laid on behalf of the appellant. It is hardly arguable I think for this reason, that, as I have said, the scheme of legislation up to 1914, at any rate, was that the certificate of naturalization in Great Britain should give rights within Great Britain and within Great Britain alone, and that the certificate in a British possession should give rights within that British possession, and within that possession alone.

In 1914 the British Nationality and Status of Aliens Act, 1914, was passed, by which if a British Dominion chooses to adopt the Act certificates of naturalization may be granted by the Secretary of State in England, and by the authorities of the Dominion, which will confer the rights of British subjects generally, that is to say, generally with the exception that it will not confer them upon any Dominion mentioned in the Schedule to the Act which has not adopted the Act, but, subject to that, certificates given either in a Dominion or in Great Britain will give the general rights of British subjects. The provisions however of that Act do not apply to the appellant because he was not naturalized under it. In addition to what is the scheme of the Naturalization Act, 1903, the wording of that Act is, to my mind, as clear as possible. It says that a certificate of naturalization may be granted, and when granted the result is (s. 8) that the person to whom it is granted "shall in the Commonwealth be entitled to all political and other rights powers and privileges and be subject to all obligations to which a natural-born British subject is entitled or subject in the Commonwealth." Although it was pointed out that the section

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does not say "and nowhere else," it seems to me that that is its obvious and plain meaning. The effect of the section is to confer certain rights, and no others. The certificate of naturalization granted to the appellant has therefore only that limited effect, and, according to that, and by virtue of that, I think he gets no rights here at all.

I come now to the point upon which the greatest stress was laid—namely, that it was a condition precedent to obtaining that certificate of naturalization that the appellant should take an oath of allegiance; that as soon as he had taken that oath of allegiance he became the King's liegeman wherever the King and he might be; and therefore he ceased to be an alien not only in the Commonwealth of Australia but also throughout the Dominions of the King. In answer to that contention the Divisional Court held that the oath of allegiance had not necessarily that effect. I need not read all the judgments, but the relevant and important parts of them, I think, are in some three passages which I will read. The Court consisted of Darling, Bray and A. T. Lawrence JJ. Darling J., after commenting on *Calvin's Case* (1), to which I shall refer later, said (2): "Be that as it may, I am of opinion that a man by virtue of such a certificate of naturalization as was granted here and of the oath of allegiance may become the liege subject of the King in some part of his dominions yet not in all; and wherever he is not a subject he is an alien." Bray J. said (2): "The certificate of naturalization contains the same limitations;"—that is the limitations that he had previously referred to in the Acts of 1900 and 1903—"it affected only the rights and obligations in the Commonwealth, yet it is said that inasmuch as this man had taken the oath of allegiance which every person who is naturalized has to take, his status in the United Kingdom was immediately altered, and he became a British subject there, in defiance of these restrictions. This is an impossible result. I see no difficulty in a man becoming a British subject in the Commonwealth and not in the United Kingdom if an Act of a State, acting within

(1) 7 Rep. 1*a*. (2) [1918] 1 K. B. 622.

its powers, so enacts; and that is what, in my opinion, the Commonwealth Act of 1903 did enact." A. T. Lawrence J. said (1): "Before this limited naturalization"—that is to say, the naturalization in Australia—"he"—that is the appellant—"was an alien. Nothing but naturalization under powers conferred by Act of Parliament of the United Kingdom can make him other than an alien in the United Kingdom. If this certificate of naturalization had purported to confer upon him the rights of a British subject within the United Kingdom it would have been ultra vires. It does not, of course, purport to do anything of the sort. It is limited in its application to rights and duties within the Commonwealth." Then he continues: "And the oath of allegiance which was relied upon by Sir Ernest Pollock does not appear to me to extend the limits of the applicant's naturalization. It is quite true that allegiance creates reciprocal rights and duties. Allegiance is not created by the oath, it exists apart from it; and before any oath has been taken, as in the case of the natural-born subject, so also in the case of the foreigner resident within this country or within the dominions of the King. The oath of allegiance does but consecrate the allegiance already existing. It is ex provisione hominis, as stated in *Calvin's Case*. (2) This applicant's allegiance is local allegiance, and no authority has been given by the sovereign power to any one to accept any wider allegiance from him. This seems to me to be the result in law, and I cannot ignore the fact that the practical considerations which would determine the grant or refusal of naturalization in far-away Australia are different from those which ought to guide the authorities in granting naturalization within the United Kingdom."

Those are the passages containing the gist of the reasoning which is challenged in the present case. Without adopting every expression that is used by the learned judges, I think in substance that reasoning is correct. It seems to me that when you look at this legislation you find that the intention of the Legislature was to confer rights and privileges only within the limits of the State or the Dominion which granted

(1) [1918] 1 K. B. 624. (2) 7 Rep. 1*a*.

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the certificate. That is quite clear. As a condition for obtaining those rights and privileges the applicant was required to take an oath of allegiance. He is, of course, a person who is not a natural-born subject, but an alien at the time he makes his application, and it seems to me that an oath of allegiance taken by a person who is not a natural-born subject, for the purpose and as a condition of acquiring certain limited rights, does not necessarily confer any privilege upon, or alter the status of, the person taking it in respect of those limited rights. That is to say, what is contemplated by the Acts of Parliament requiring the oath of allegiance is that the oath of allegiance shall be co-extensive with the rights as a condition of acquiring which it is required.

It is said that that cannot be so, and *Calvin's Case* (1) and the cases cited in it were those which were most relied upon for that proposition. I think the effect of *Calvin's Case* (1) is this. It shows that allegiance in the case of a natural-born subject to a liege lord who is also a liege lord of more than one dominion is not confined to the dominion in which the liegeman was born, but is a personal allegiance to the liege lord throughout all his dominions. It also shows that there may be, though in circumstances very different from those of the present case, a local allegiance in a person who is not a natural-born subject. It therefore does not exclude the possibility of a limited allegiance in the case of a person who is not a natural-born subject, and it leaves us at liberty to inquire what was the intention of the Legislature when we are dealing with Acts of Parliament, as we are here, in requiring that oath of allegiance. Was the intention that the person taking the oath of allegiance should become—I will not put it positively, because I have said I do not understand positively what it is—not an alien throughout the whole of the Sovereign's dominions? It seems to me that when the whole of the legislation is looked at that was not the intention of requiring the oath of allegiance, and I do not think that the authority of *Calvin's Case* (1), and the cases cited in it, prevent us from inquiring what was

(1) 7 Rep. 1*a*.

the intention. Therefore I think the decision of Astbury J. following that of the Divisional Court was right.

Another point was taken by the Attorney-General which, if right, was a very short cut indeed to the decision of this case. He said that by the Act of 1914 the appellant was an alien, whatever he might have been before it was passed, and that by virtue of the definition section (s. 27). Reading that section as I think he did in the proper logical order in its clauses, he read the third clause first. That clause is: "The expression 'certificate of naturalization' means a certificate of naturalization granted under this Act or under any Act repealed by this or any other Act." Therefore it did not include a certificate granted by a Dominion. Then the clause: "The expression 'British subject' means a person who is a natural-born British subject, or a person to whom a certificate of naturalization"—and that does not include a Dominion certificate—"has been granted." Then the clause: "The expression 'alien' means a person who is not a British subject." Of course if those definitions were to be applied to the present case the appellant is an alien. But s. 27 begins with the words: "In this Act, unless the context otherwise requires," these expressions are to have these meanings, and I am not at all satisfied as to the extent of the limitation of the application which is put upon them by these words. Therefore, although I think that the Act does create these difficulties in the appellant's way, I prefer not to base my judgment upon them. I base my judgment upon the grounds which I have already stated. I think therefore that this appeal should be dismissed.

WARRINGTON L.J. I am of the same opinion. The appellant asks the Court to make a declaration that he is no alien in England but a liege subject of His Majesty the King, and entitled to the protection of His Majesty in all parts of His Majesty's Kingdom and Dominions. He therefore asks for a declaration which is in part negative and in part affirmative. The negative part is that he is no alien in England, and the affirmative part is that he is a liege

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subject of His Majesty the King. That is to say, he asks us to declare that he has some status different from that of an alien and different from that of a natural-born or fully naturalized British subject. No authority has been cited for the proposition that there is that third intermediate status between a British subject entitled to privileges and subject to the duties and obligations as such and an alien, but we have to consider now, for the first time, whether the appellant has established that he is a person who enjoys such an intermediate status.

It seems to me, and I desire to found my judgment upon this, that the question really turns upon the true construction and effect of the legislation partly in this country and partly in the Commonwealth of Australia under which naturalization is granted to aliens born. The appellant is indisputably by birth an alien, and he has not obtained a certificate of naturalization under the Imperial Act, the Naturalization Act of 1870. He has obtained a certificate of naturalization under an Act, No. 11 of 1903, passed by the Legislature of the Commonwealth of Australia. Those are the short facts. Being an alien born, his status as a person who has obtained a certificate of naturalization is the creature of the statute under which the certificate is granted, and it is indisputable and it is not disputed that it is competent for the Legislature to impose such restrictions, qualifications or limitations as it may think fit upon the status which is to be conferred by the statute or by the certificate granted under it, and that the status of the individual will be regulated by the conditions so imposed.

The legislation commences for the present purpose with our own Naturalization Act of 1870. I need not read anything more than the provision of that Act which is contained in the third paragraph of s. 7 and s. 16 which relates to the power of the Dominions to legislate with regard to naturalization. The third paragraph of s. 7 is this: [His Lordship read the paragraph and continued:] There are certain qualifications which I need not read, because for the purposes of this case we are to assume that the appellant had

completely ceased to be a subject of either the German Empire or of the Kingdom of Prussia. The point is that the person to whom the certificate of naturalization is granted shall, in the United Kingdom, be entitled to the rights, powers, and privileges which are therein mentioned. Before the certificate of naturalization can take effect, that is, before the applicant will actually become entitled to those rights, powers, and privileges, it is enacted that he is to take the oath of allegiance; in other words, the taking of the oath of allegiance is by that Act made a condition sine qua non for the validity and operation of the certificate of naturalization. With regard to the colonies, as they were then called, or the British possessions (it is "colonies" in the marginal note), s. 16 enacts. [His Lordship read the section and continued:] It is quite clear that the scheme of this Act was by means of naturalization to grant to an alien certain rights, powers, and privileges, but local in each case; local in the United Kingdom if granted under that Act; local in one of the colonies if that colony should legislate on the subject and naturalization should be granted in pursuance of that legislation.

The next step material to the present purpose was the Commonwealth of Australia Act, 1900, which by art. 51 (xix.) of the Constitution thereby established gave to the Commonwealth Parliament the power to make laws with respect to (inter alia) "Naturalization and aliens," and in pursuance of the power so given the Commonwealth Parliament enacted the Naturalization Act, 1903. It is, as I have said, on the construction and effect of that Act that I think the question really turns. I need not read s. 7. It merely gives power to the Governor-General in Council to grant a certificate of naturalization, but requires, and this is not immaterial, that the Governor-General shall not issue the certificate until he has received from the applicant the certificate of one of the officers therein enumerated that the applicant has before him taken an oath or affirmation of allegiance in the form in the schedule to the Constitution. The wording of that section—and it may have some substantial effect—differs

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from that of s. 7 of the Naturalization Act, 1870. The latter section provided that the certificate might be granted, but should not take effect until after the oath of allegiance had been taken. In the Commonwealth Act of 1903 the certificate is not to be issued until after the oath of allegiance has been taken. Sect. 8 of the latter Act provides. [His Lordship read the section and continued:] A person to whom a certificate of naturalization is granted is a person who has taken the oath of allegiance, and he is the person to whom certain political and other rights and privileges are granted. He is an alien, and he starts with none of the rights, powers, and privileges of a British subject. He derives those rights, powers, and privileges from the Act itself, and the Act gives them to him in the Commonwealth, and not elsewhere. I agree that the words "not elsewhere" are not included, but it seems to me that that is quite immaterial; he derives his rights, powers, and privileges from the Act, and he can only get those rights, powers, and privileges by the Act which confers them. The Act confers them as the rights, powers, and privileges of a British subject in the Commonwealth.

The appellant is asserting that he is entitled to certain rights, powers, and privileges—I am obliged to say, of a British subject; perhaps I ought more correctly to say, following Mr. Upjohn's argument,—of a person who is not an alien in this country. I say he is claiming those rights, powers, and privileges, because he is claiming to be exempt from certain restrictions and inconveniences to which a person who is an alien is subject in this country. He is therefore claiming something more than is conferred on him by the Commonwealth Act. Under the certificate of naturalization it is quite plain, to my mind, that he is not entitled to claim any political or other rights, powers, or privileges except in the Commonwealth. But what it is said is that though he may not be entitled to claim the privilege of not being regarded as an alien by virtue of the certificate of naturalization, he can do so because he has taken the oath of allegiance. I have already pointed out that before he can have obtained the certificate he must have taken the oath of allegiance, and

that the person to whom those limited rights are granted is the person who has taken the oath by the very terms of the Act. It seems to me that the only conclusion that one can draw from that fact is that the Act has itself provided that the oath shall be taken as a condition, and for the purpose of obtaining those privileges, and for no other purpose, and that no person had any authority on behalf of His Majesty in the Commonwealth of Australia to accept the oath from the appellant except with the limitation which I have pointed out.

In my judgment that concludes the case unless there is something in the constitutional law of this country which prevents us from giving effect to that which I consider is the true construction and effect of this Act.

Great reliance has been placed on *Calvin's Case* (1), and the cases which were cited in it. The effect of that case, and of the cases cited in it, have been explained by my Lord. I entirely agree with that explanation, and I do not think it necessary to add anything further.

For the reasons that I have stated, the case seems to me to turn on the construction of the Act of 1903. We are not prevented by anything in the authorities to which we have been referred from giving to that Act that which I think is the natural construction of the words which have been used.

With regard to the British Nationality and Status of Aliens Act, 1914, I agree that that Act really does not apply, and I think it is better not to express any opinion upon the construction of it.

The result is that, in my opinion, this appeal fails, and ought to be dismissed.

YOUNGER L.J. While I agree that the British Nationality and Status of Aliens Act, 1914, need not be referred to for the purpose of arriving at an affirmative decision in this case upon what I may call the broad aspect of it, nevertheless the discussion which has taken place here has satisfied me that the appellant is at least to this extent to be regarded as

(1) 7 Rep. 1*a*.

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an alien, that he is a person so described in that Act, and for the purposes of that Act. He is a person entitled under that Act to apply as an alien for and to have granted to him in the United Kingdom a certificate of naturalization. In these circumstances, apart from any other difficulty in his way, I think it is impossible to make in the appellant's favour, without a necessary qualification which would deprive it of most, if not all, of its significance, the declaration that he seeks—namely, that he is no alien in England. He certainly is an alien here for certain very important purposes.

But the question remains whether in the United Kingdom his status can, speaking generally, be properly described otherwise than as that of an alien, and I think it cannot. This does not mean that he is a former enemy alien. I accept for my own part the evidence of Dr. Schuster, that the appellant had definitely and permanently lost his original Prussian nationality long before the outbreak of the late war. He had also become, and is now, a naturalized Australian subject of the King, and he is entitled in the United Kingdom to the rights, powers, and privileges statutory or otherwise appertaining to that position. But I agree with the other members of the Court that that position does not confer upon him within the United Kingdom the rights of a British subject as such, and if it does not, then I know of no other way in which to describe the appellant's status here than to say that he is an alien.

It became increasingly difficult as the argument proceeded for Mr. Upjohn to maintain the contention, never very strongly pressed by him, that the appellant's Australian certificate of naturalization by itself conferred upon him in the United Kingdom any of the rights of a British subject. At the close his main, if not his only, contention in support of the appellant's case, was based upon the oath of allegiance which, under the Commonwealth statute, the appellant had to take as a condition precedent to the grant of that certificate. Mr. Upjohn cited no authority that I could follow for the proposition that the oath of

allegiance of itself operated to effect any change of status or did more than, as A. T. Lawrence J. said in *Rex* v. *Francis* (1), consecrate the allegiance already existing. This, I think, is shown by *Calvin's Case* (2) itself, where the Court speaks of the limited effect of letters of denization accompanied as they were by the denizen taking the oath of allegiance. For myself I prefer to take this view of the matter. But if it be correct, as Mr. Upjohn in his argument agreed it was, that a mere oath of allegiance gratuitously taken has no operation on status, it becomes, I think, clear as a logical consequence that if the oath, which in form is never varied, depends for its validity upon the Royal request, express or implied, so its operation must be limited by the terms in which or to the purpose for which that request is made. In the present case, as I think is clear on the true construction of the Commonwealth statute, the oath to consecrate the applicant's naturalization in Australia is as limited in its operation as is that naturalization itself.

Accordingly for these reasons I agree with the other members of the Court in thinking that the appellant has failed to make good his contention, and I think with them that the appeal must be dismissed.

Appeal dismissed.

Solicitor for appellant : *Alfred D. Levi.*
Solicitor for Crown : *The Treasury Solicitor.*

(1) [1918] 1 K. B. 617, 624. (2) 7 Rep. 1*a*.

W. I. C.

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Jan. 16.

In re GIBBONS.

GIBBONS *v.* GIBBONS.

[1919. G. 424.]

Will—Construction—Option to "occupy and enjoy the use of" a House and Furniture—Exercise of Option—Tenancy for Life—Right to exercise Powers of Tenant for Life—Settled Land Act, 1882 (45 & 46 *Vict., c.* 38), *s.* 51.

A testator after providing for the upkeep of his house, grounds and furniture as a residence for his family until the youngest of his children should come of age, gave to his eldest son, as soon as that event happened, the option of occupying and enjoying the use of the house and furniture without payment of rent during his life, such option to be exercised by a written notice to the trustees of the will within three months from the time when the right to exercise it arose. Subject to this similar options were given in succession to the other two children of the testator, and there was an ultimate gift of his residuary estate to the trustees in trust for the three children. The youngest child having attained twenty-one the eldest son in 1913 gave notice to the trustees of the exercise of his option. He resided in the house until 1916 when he let it unfurnished and removed the furniture to another house which he rented :—

Held, that the gift was not of a mere option to reside. Upon the exercise of the option the son became beneficially entitled to possession of the settled property within the meaning of s. 2, sub-s. 5, of the Settled Land Act, 1882, and was therefore tenant for life under the settlement created by the will; and under s. 58, sub-s. 1 (vi.), he had the powers of a tenant for life under the Act, including a power to let.

Decision of Eve J. [1919] 2 Ch. 99 reversed.

Appeal from a decision of Eve J. (1)

By his will dated March 16, 1900, Alfred Robert Gibbons appointed the plaintiffs executors and trustees, and to be trustees thereof for the purpose of any Act of Parliament.

By clause 11 of his will the testator gave directions to his trustees for the expenditure of 1000*l.* per annum for the keeping up, repairing and insuring of his residence known as "Pears Hill," Windlesham, Surrey, and the garden and grounds, and also all furniture, plate and effects, both indoor and outdoor, as a residence for his children for so long a period, previously to his youngest child for the time

(1) [1919] 2 Ch. 99.

being attaining twenty-one, as his trustees should think fit. Clause 14 of the will was as follows: "I give to my eldest son, Sidney Alfred Gibbons, as soon as my youngest child for the time being shall have attained the age of twenty-one years, the option of occupying and enjoying the use of the premises mentioned in clause 11 during his life without payment of rent, but paying all rates, taxes and outgoings, and keeping the said premises in a proper state of insurance and in good and substantial repair, such option to be exercised by a notice in writing to be given or sent to the trustees by the said Sidney Alfred Gibbons within three calendar months from the time when the right to exercise such option shall arise." Subject as aforesaid (by clause 15) the testator gave a similar option to his second son, Edwyn Ingram Gibbons, and to his daughter Nora Gibbons in succession, to be exercised in like manner; and by clause 16 the trustees were not, during the residence of any of the testator's said children at "Pears Hill," by virtue of clauses 14 and 15, to be in any manner responsible for or concerned to see to the state and condition, or the insurance or repairs of the buildings, or the safe custody preservation or insurance of the chattels or effects in the occupation custody or power of any of his said children.

By subsequent clauses of his will the testator gave his real and personal estate to his trustees upon trust for conversion, with directions for the payment of certain annual sums for the benefit of his children while under twenty-five, and he then directed that his residuary estate should be held in trust for such one or more of his children, the defendants, Sidney Alfred Gibbons, Nora Hobbs (formerly Nora Gibbons) and Edwyn Ingram Gibbons, as being male should attain twenty-five and not have alienated or charged their interests in his estate, or, being female, should attain the age of twenty-one or marry under that age.

All the testator's three children had attained twenty-five, and the sons had not alienated or charged their interests.

Edwyn Ingram Gibbons, the testator's youngest child, attained twenty-one on November 2, 1912, and on January 6,

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1913, Sidney Alfred Gibbons gave notice in writing to the trustees exercising the option of occupying and enjoying the use of " Pears Hill " and the furniture therein. On April 26, 1917, Edwyn Ingram Gibbons died, and the third defendant, Gladys Violet Gibbons, was his legal personal representative. After the exercise of his option, S. A. Gibbons entered into the occupation of " Pears Hill " and used the furniture therein until the autumn of 1916. He then ceased to occupy the house, and by a lease dated February 22, 1917, let it unfurnished for a term of fourteen years, and removed the furniture, taking the greater part of it to a smaller house at Reading which he rented.

The defendant, Nora Hobbs, having claimed that on Sidney Alfred Gibbons ceasing to occupy " Pears Hill " and removing the furniture, the house and furniture fell into the testator's residuary estate, a summons was taken out by the trustees of the will asking whether that was so according to the true construction of the will, or whether the said defendant still remained life tenant thereof.

EVE J. held that Sidney Alfred Gibbons, on ceasing to reside at " Pears Hill " had lost his interest in the premises, upon the ground that no estate at all was given to him by the will, but only an option to reside in the house, and on ceasing to reside his interest came to an end.

Sidney Alfred Gibbons appealed.

Romer K.C. and *Sheldon* for the appellant. By the exercise of his option the appellant became beneficially entitled to the property during his life. He is therefore tenant for life and has all the powers of a tenant for life under the Settled Land Act: *In re Paget's Settled Estates.* (1)

Eve J. held that the will gave no estate or interest to the appellant but only an option on certain conditions to reside in the house and when the conditions were no longer complied with the option determined. It is submitted that he was wrong in so holding. The appellant has exercised the option, and if there were any provision or condition in

(1 (1885) 30 Ch. D. 161.

the will purporting to prohibit or limit the exercise by him of his powers under the Settled Land Act it would be avoided by s. 51.

Where a testatrix directed her trustees to permit her daughter at any time and from time to time during her life to reside at a certain mansion house it was held that the daughter was tenant for life within s. 2, sub-s. 5, of the Settled Land Act: *In re Baroness Llanover's Will.* (1) *In re Boyer's Settled Estates* (2) is another case on permission to reside during life, and it is submitted that it is very like the present case.

Independently of the Settled Land Act the appellant is entitled to "occupy and enjoy the use of" the property during his life, and that gives him the right either to reside n the house or let it: *Mannox* v. *Greener* (3); *Rabbeth* v. *Squire.* (4)

W. A. Greene for the respondent Nora Hobbs. Apart from the Settled Land Act, the right to "occupy and enjoy the use of" the premises comes to nothing more than a right to reside. The testator has only given the appellant an option to reside with successive similar options to his other children to have effect upon the appellant's ceasing to reside, which he might do at any time after exercising his option. Upon the Settled Land Act point, s. 51 does not really affect this case. There is a distinction between the gift of an estate and a mere option. The beneficiary is bound by the conditions under which the interest is given to him. He must be considered as undertaking to give up the property upon his ceasing to reside there. Sect. 51 is aimed at a gift of an estate upon a condition subsequent.

[WARRINGTON L.J. referred to s. 50, sub-s. 2, of the Settled Land Act.]

There is here no contract by a tenant for life not to exercise his powers under the Act.

D. D. Robertson for Gladys Violet Gibbons in the same interest. The appellant has the right to reside only on the terms that he should actually do so. That being the nature

(1) [1903] 2 Ch. 16.
(2) [1916] 2 Ch. 404.
(3) (1872) L. R. 14 Eq. 456.
(4) (1859) 4 DeG. & J. 406.

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and extent of his interest he is not entitled to let the property : *May* v. *May*. (1) No case has been cited in which all that was given was a mere option to reside.

Romer K.C. in reply. This is really a gift subject to a condition. It is a gift by the will of an option to occupy and enjoy the use of the property conditional upon the exercise of the option by giving notice to the trustees. There is really no difference between this case and *In re Boyer's Settled Estates*. (2) The right to use the furniture stands on the same footing as the right to reside in the house.

May v. *May* (1) was decided before the Settled Land Act was passed, and has no application to the present case.

LORD STERNDALE M.R. This is an appeal from Eve J. arising under the will of Alfred Robert Gibbons. By his will he gave directions to trustees to keep up his residence and the grounds and appurtenances as a residence for his children up to the time that the youngest child attained the age of twenty-one, and he then, by clause 14 of the will, says : "I give to my eldest son Sidney Alfred Gibbons as soon as my youngest child for the time being shall have attained the age of twenty-one years the option of occupying and enjoying the use of the premises mentioned in para. 11 during his life without payment of rent but paying all rates taxes and outgoings and keeping the said premises in a proper state of insurance and in good and substantial repair such option to be exercised by a notice in writing to be given or sent to my trustees by the said Sidney Alfred Gibbons within three calendar months from the time when the right to exercise such option shall arise." And then, subject as aforesaid, the testator, by the next clause, gave a similar option to his second son and to a daughter. The son has died, and the daughter is really the person who is interested in this matter. Clause 16, immediately following those two, said : "My trustees shall not during the residence of any of my said children at Pears Hill aforesaid by virtue of the two last preceding clauses"—those are the clauses giving the

(1) (1881) 44 L. T. 412. (2) [1916] 2 Ch. 404.

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option—"be in any manner responsible for or concerned to see to the state and condition or the insurance or repairs of the buildings." The eldest son, Sidney Alfred Gibbons, within three months of the time mentioned—namely, the time when the youngest child attained the age of twenty-one—gave notice in writing to the trustees exercising his option of occupying and enjoying the use of the house and furniture. He then entered into occupation of the house and used the furniture there until the autumn of 1916, when he ceased to occupy the house, and by a lease in the beginning of 1917 let it unfurnished for a period of fourteen years and took the furniture to another house which he had taken near Reading. It was then claimed on behalf of the defendant, the sister, that on his ceasing to occupy the house and removing the furniture he had ceased to have any further interest in the premises, and a summons was taken out by the trustees to determine that point amongst others. Eve J. decided that S. A. Gibbons had lost his interest in the premises, I think, upon this ground: that there was no estate given to him at all, and that all that he had was a right to reside in the house, and as soon as he ceased to reside in the house—apart from any question of the Settled Land Act, or any other Act—he ceased to have any interest because he had exercised the option of residing, and there was an implied term that he would give up all interest as soon as he ceased to reside, or he had taken an option of residing and of residing only, and that his interest came to an end when he ceased to reside. What lies at the root of that judgment is that there was no gift by the will to Sidney Alfred Gibbons at all. I regret that I cannot agree with the learned judge upon that point. The clause says: "I give to my eldest son Sidney Alfred Gibbons as soon as my youngest child for the time being shall have attained the age of twenty-one years the option of occupying and enjoying the use of the premises mentioned in para. 11." Then it was provided that that option was to be exercised within three calendar months from the time when the right should arise, and to be exercised in writing. I think as soon

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as that option was exercised the position became exactly the same as if the gift had been: I give to my eldest son Sidney Alfred Gibbons the right of occupying and enjoying the use of the premises mentioned. His position was really very much like that of the children in *In re Boyer's Settled Estates* (1), where, after providing for a right in the testator's widow to reside in his house, the will provided that the trustees were to hold the house for such children as should desire to reside there. There were two children who said they wished to reside there. I cannot see any difference between saying, "I will give my son an option of occupying and enjoying the premises if he exercises that option within a certain time," and saying, "I will give the right to such of my children as choose to express their desire after the occasion has arisen." In one case they express the desire before, in the other they express the desire after; but it seems to me that as soon as ever the option was exercised the position became exactly the same. In that case Sargant J. said, and I think the words apply exactly to this case, "In my judgment, when once these two children, the applicants, had expressed their desire to occupy and had become entitled to the right of occupation"—that is to say, in this case when once this son had exercised his option—"they from that time forward were persons beneficially entitled to possession of the land, their beneficial title to possession was for the purposes of this legislation tenancy, and they were accordingly brought within the precise terms of s. 58, sub-s. 1 (vi.)" of the Settled Land Act, 1882. That, I think, is really enough to dispose of the case; if it were a gift, then of course Eve J.'s judgment is wrong, because it proceeds upon the basis of there being no gift, but only an exercise of an option upon a condition. If the exercise of that option did not operate to convert the conditional gift in the will into an absolute one I do not quite know what the effect of it was. It was called a quasi contract, and I presume that it was called a quasi contract from the difficulty of specifying who were the parties to

(1) [1916] 2 Ch. 404, 412.

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the contract if it were one. It does not seem to me to have been anything of the kind; I think it was a gift under the will as soon as the option was exercised.

That is enough to dispose of the case as I have already said, because the son, Sidney Alfred Gibbons, was a tenant for life for the purpose of the Settled Land Act under s. 2. But I am not disposed to agree that this was a gift of an option to the son to reside only; the words used are an option "to occupy and enjoy the use of," and unless there be something to show that the meaning of those words is restricted, they extend to something beyond residence, as has been decided in many cases. In this case I do not myself see anything to limit the words. I agree that the idea in the testator's mind was probably that his children should reside in the house. The difference between the words "reside" and "occupy and enjoy the use of" is perfectly well known. If he meant to restrict it to residence I do not see the reason for his not using the appropriate word "reside." But it is said that clause 16 of the will imposes a certain obligation upon the trustees in the case of non-residence of any of the children and that that points to the words used in clause 14 as being intended to mean residence only. It does not seem to me that clause 16 has that effect. It may produce an anomaly, wills often do, but I cannot see anything sufficient in it to restrict the meaning of the plain words of clause 14. It may be explicable in the way Mr. Romer explained it, or it may not be explicable except by saying that by some mistake or some unintentional use of words it has produced an anomaly that was not intended. If it has I cannot help it, but it does not seem to me that the clause has sufficient effect to restrict the meaning of the words in clause 14. I think therefore that this appeal should be allowed.

WARRINGTON L.J. I am of the same opinion. The first question is, Did the son, Sidney Alfred Gibbons, according to the true construction of the testator's will and in the events which happened, obtain any and what interest in the

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premises in question, the house and chattels described in the eleventh clause of the testator's will? The testator by the fourteenth clause of his will gave to Sidney Alfred Gibbons as soon as the youngest child for the time being should have attained the age of twenty-one years the option of occupying and enjoying the use of the premises mentioned in clause 11 during his life, such option to be exercised by a notice in writing to be given or sent to the trustees by the said Sidney Alfred Gibbons within three calendar months from the time when the right to exercise such option should arise. The option arose in the month of November, 1912. On January 6, 1913, the son gave the notice necessary in order to exercise that option. Having exercised the option the result in my opinion is that he thereupon became by virtue of the will entitled to occupy and enjoy the use of the premises over which the option extended. It was contemplated by the will, not that it should be an option exercisable from time to time, but exercisable once for all on the expiration of the three months referred to in clause 14. In my opinion therefore the effect is exactly the same, in the events which have happened, as if the testator had given to the son in respect of this property the right of occupying and enjoying the use of it during his life. What is meant by occupying and enjoying the use of a house and chattels during a man's life? It is said that according to the true construction of this will it means that he is only to enjoy the use of either the house or the chattels so long as he personally resides in the house. To test that I first look at the words themselves in clause 14. He is to have the right of occupying and enjoying the use of a house and chattels. There are more ways than one in which a man may enjoy the use of a house; one way of enjoying the use of a house is to let somebody else occupy it and pay you rent. So with regard to chattels, he may enjoy the use of a bed whether he sleeps in a particular house or in some other house, enjoying the use of the furniture is not confined to enjoying its use in a particular place. It seems to me therefore that so far as that clause is concerned

there is plainly no limitation of his right to enjoy the use of the house and furniture wherever he desires to enjoy that use.

Then it is said that there are indications in the will that the testator intended, and I am using the word "intended" in the strict legal sense, that is to say intended according to the true construction of the will, that his son's occupation and enjoyment of the use of the house and premises should be confined and limited to residence in the house. Reliance is placed on an expression in clause 16. That expression is this, the testator provides that his trustees shall not during the residence of any of his said children at Pears Hill, by virtue of the two last preceding clauses, that is 14 and 15, be in any manner responsible for or concerned to see to the state and condition or the insurance of the premises and so forth. It may be that under clause 14 the son may reside there. Residence is included in the means by which he may enjoy the use of the house. So long as he is residing there it is provided that the trustees shall not be concerned to see to the state and condition of the house; that is all, it does not limit the mode in which the son, to whom the occupation and enjoyment of the use of the house is given, should enjoy it by way of residence, it only shows what the testator contemplated, that one mode at all events of enjoying the use of the house might be residing there. If I am right in that construction I think there is no further difficulty in the case, because, if that is right, then the son is a person for the time being under this will, which is the settlement in question, beneficially entitled to the possession of settled land for his life, and he is a tenant for life under s. 2 in every sense, not merely a person having the powers of a tenant for life under s. 58, and there is no condition or limitation purporting to deprive him of his powers as a tenant for life or to make his estate to cease on the exercise of such powers. So that s. 51 really has nothing to do with it. I think he is in the strict sense a tenant for life under sub-s. 5 of s. 2; he was entitled to exercise, as he has done, the power of leasing, his estate was not affected by the exercise of such

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power, and accordingly the decision of Eve J. to the contrary is incorrect, and I think ought to be reversed.

YOUNGER L.J. I am of the same opinion.

Appeal allowed.

Solicitors: *Potter, Sandford & Kilvington; McKenna & Co.; George R. Cran.*

G. A. S.

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CLARKE-JERVOISE *v.* SCUTT.

[1919. C. 555.]

Landlord and Tenant—Agreement of Tenancy—Covenants—Construction—Cultivation in husbandlike Manner—Covenant not to plough up "grass land"—Interim Injunction—Damages—Costs.

By a tenancy agreement made in 1894 the trustees of an estate, of which the plaintiff was the present tenant for life in possession, agreed to let to the defendant certain farm lands and house buildings comprising 138 acres more or less, as described in a schedule attached to the agreement, on a yearly tenancy, at the rent of 48*l.* The tenant covenanted to manage and cultivate the land in a husbandlike manner, and that he would not plough or otherwise break up "any grass land" without the consent of the landlord. In the schedule to the agreement the premises were described as consisting of 130 acres 1 r. 31 p. of arable and 8 acres of grass land. In 1898 the tenant laid down 40 acres more to permanent grass. On notice being given to him to determine the tenancy on September 29, 1919, he claimed the right to plough up this 40 acres of permanent grass which had been arable at the commencement of his tenancy.

In an action by the plaintiff to restrain him from so doing in breach of his covenants an interim order was made granting the injunction on the usual undertaking as to damages. The defendant counterclaimed for damages by reason of the interim order:—

Held, that on the true construction of the agreement, the covenant not to plough up any grass land was not restricted to the 8 acres of grass at the date of the demise but extended to the grass land in dispute, and the plaintiff was entitled to the relief claimed.

Held, further, on the evidence, that the proposed dealing with the land

would have been a breach of the covenant to cultivate in a husbandlike manner, and also that the defendant had suffered no damage from the granting of the interim injunction.

Rush v. *Lucas* [1910] 1 Ch. 437 distinguished.

ACTION with witnesses.

The plaintiff, Sir Dudley Alan Lestock Clarke-Jervoise, Baronet, was the legal tenant for life in possession of the Idsworth estate, in the county of Hants, and the defendant, Thomas Scutt, was the tenant of a farm called the Stein Farm, forming part of the Idsworth estate.

By an agreement of tenancy dated March 27, 1894, the then trustees of the Idsworth estate agreed to let to the defendant certain farm lands, house buildings and appurtenances containing altogether 138 acres (more or less) as described in the schedule attached to the tenancy agreement, from September 29, 1894, to September 29, 1895, and so on from year to year, until either party should give to the other one year's notice to terminate the tenancy prior to September 29 in any year, at the yearly rent of 48*l*. The agreement contained covenants by the tenant, inter alia, that the land should be cultivated and managed during the tenancy in a husbandlike manner, and that the tenant should not "plough, pare, burn, or otherwise break up any grass land" without the written consent of the landlords under a penalty of 50*l*. an acre, and would cut all thistles and weeds and carefully roll and brush all the grass lands once a year. The agreement also provided for the payment of certain allowances by the landlords, or the incoming tenant, as compensation for unexhausted improvements, including payments in respect of the cost of linseed or cotton seed cake consumed on the grass land which should have been grazed and not mown during the last year of the tenancy, and in respect of the cost of artificial manures on pasture land which should have been grazed but not mown.

In the schedule to the agreement the land was described as consisting of 130 acres 1 r. 31 p. of arable land and 8 acres of grass land. In 1898 the defendant, with the knowledge and consent of the then tenant for life of the estate, and entirely at his own expense, laid down a further portion of the arable

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lands included in the agreement to permanent grass. This amounted to some 40 acres, which formed part of a field called "Swallow Holes," and had remained permanent grass ever since. By an agreement dated April 23, 1906, the defendant granted to the Rowlands Castle Golf Club at Idsworth the right to enter upon two of his fields known as "The Swallow Holes" and "The Forest" (the former being the land so laid down in permanent grass) for the purpose of playing golf thereon, but subject to a reservation to himself of the rights of grazing and cutting grass on these fields from March 25, 1906, and during the period that he remained in possession of the fields as tenant, at the rent there mentioned, and subject to a provision that the grant thereby created should cease six months previously to the termination of his own tenancy. Prior to September 29, 1918, the plaintiff served due notice on the defendant to quit the premises held by him under the tenancy agreement, on September 29, 1919.

On March 13, 1919, the defendant gave notice to the Golf Club that on March 26, 1919, he intended to plough up the 40 acres of the "Swallow Holes" field of permanent grass which was being used by them for purposes of golf, and that he required possession on that date to enable him to plough. His intention was to take a crop during the six months from March 25 to September 29, 1919. The plaintiff alleged that the ploughing up of this land would be a breach of the covenant in the tenancy agreement not to plough up "any grass land," and also be a breach of the covenant to cultivate and manage the land in a husbandlike manner. The writ in the action was issued on March 19, 1919, and by an order made by Peterson J. on March 28, 1919, on the plaintiff's motion for an interim injunction, upon the usual undertaking as to damages by the plaintiff, an injunction was granted restraining the defendant until judgment in the action from ploughing up the field.

The defendant denied the alleged breaches of the covenants in the tenancy agreement, and by his counterclaim asserted that the 40 acres which, but for the injunction, he would have ploughed up, would have brought him a clear profit of 10*l.*

an acre; and he claimed a declaration that he was entitled to plough up during his tenancy so much of the land comprised in the agreement of 1906 as was arable land at the commencement of his tenancy.

Witnesses were called on both sides on the question of husbandlike cultivation and the alleged damages: the result of this evidence sufficiently appears from the judgment of the Court.

Maugham K.C. and *Bryan Farrer* for the plaintiff. On the true construction of the agreement of 1894 the defendant has entered into an express covenant not to plough up "any grass land," that is, any permanent grass, and it is not confined to the 8 acres of grass which existed at the date of the agreement. The field of 40 acres has been permanent grass for twenty years, and the covenant applies to that. The case is distinguishable from *Rush* v. *Lucas* (1), where the covenant was not to plough up "the pasture lands," and these were construed in that case to mean those parts of the farm which were meadow land at the date of the agreement.

If the plaintiff is wrong on the point of the construction of this covenant, we contend that the defendant is also debarred from ploughing up the grass inasmuch as it would be a breach of the covenant to cultivate in a husbandlike manner. It would have been idle to plough up this land on March 26, 1919, with the hope of obtaining a remunerative crop by September 29, 1919, having regard to the nature of the soil and the abnormal wetness of that spring season.

In *Drury* v. *Molins* (2), where there was a covenant to manage pasture in a husbandlike manner, but no covenant not to convert pasture into arable, an injunction was granted to restrain a tenant from committing waste by ploughing up the pasture. They also referred to Comyns' Digest, vol. ii., tit. "Chancery," D. 11, where it was stated that an injunction would be granted to inhibit meadow, or other pasture, not ploughed within twenty years, being ploughed.

Clayton K.C. and *F. Kendray Archer* for the defendant.

(1) [1910] 1 Ch. 437. (2) (1801) 6 Ves. 328.

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First, on the question of the construction of the covenant in the tenancy agreement not to plough up any grass land, the case is covered by *Rush* v. *Lucas* (1), and is an a fortiori case. The "grass land" here must be limited to the 8 acres of grass in existence at the date of the agreement and mentioned in the schedule thereto. "Any" means "any of the grass land" in the parcels. The obligation which arises at the date of the agreement cannot be enlarged to include land subsequently laid down. *Goring* v. *Goring* (2) applies. *Drury* v. *Molins* (3) has no bearing on the present case as it was a question of waste in regard to ancient pasture land. Secondly, as to the covenant to cultivate in a husbandlike manner, such a covenant cannot be enforced by a mandatory injunction: *Musgrave* v. *Horner*. (4)

In *Morris* v. *Morris* (5) it was held not to be waste to plough up land which was not ancient meadow or pasture at the date of the lease.

With regard to the damage sustained by the defendant by reason of the interim injunction—assuming there was a right to plough up—the evidence of the defendant's chief witness established that there was a likelihood of a remunerative crop being obtained, if oats or barley was sown. The onus of proof is on the plaintiff to show that it was certain there could have been no damage. Everything is presumed against the wrongdoer: *Armory* v. *Delamirie* in Smith's Leading Cases, 12th ed., vol. i., p. 396. The plaintiff has committed a breach of the implied covenant for quiet enjoyment by obtaining the interim injunction.

Maugham K.C. in reply. On the question of damage the evidence of the principal witness on behalf of the defendant was mere wild conjecture, and the weight of evidence is entirely on the side of the plaintiff.

EVE J. (after stating the facts, continued:) The immediate effect of the laying down of the 40 acres, which was a large portion of the holding, was to modify in some respects the

(1) [1910] 1 Ch. 437.
(2) (1676) 3 Swans. 661.
(3) 6 Ves. 328.
(4) (1874) 31 L. T. 632.
(5) (1825) 1 Hogan, 238.

agreement of 1894 inasmuch as the proportions of the holding to be sown with roots, etc., were thereby varied, and this is a fact to be borne in mind in construing the other parts of the agreement. In this action the plaintiff claims an injunction restraining the defendant from ploughing or breaking up any of the grass lands used by the golf club as part of their golf course, and forming part of the land held by the defendant under the tenancy agreement, and damages. In the event which has happened, that is to say, the determination of the tenancy during the currency of the interim injunction, the only question in the action is the question of costs. But by his counterclaim the defendant seeks to recover the damages which he alleges he has suffered by reason of the interim injunction, alleging that the plaintiff was not entitled to obtain that injunction and was guilty of a breach of his implied covenant for quiet enjoyment in restraining the defendant from ploughing and breaking up the land in dispute.

It was not of course necessary to raise this claim by counterclaim, as, in the event of the plaintiff failing in the action, the defendant would have been entitled to an inquiry as to damages on the undertaking embodied in the interim order, but no one has raised any objection to the matter being dealt with on the pleadings as they stand, and I have therefore to determine whether the plaintiff is entitled to the injunction he claims, and if not, what damage, if any, the defendant is entitled to by reason of the interim injunction having been granted.

With regard to the construction of the agreement the parcels are described by reference to the schedule thereto attached, and the particulars in the schedule must therefore be read into the body of the agreement. The demised premises are described as consisting of 130 a. 1 r. 31 p. of arable land and 8 acres of grass land, and the tenant agrees that he will not plough or otherwise break up "any grass land" without the consent in writing of the landlord under a penalty of 50*l.* an acre. On his behalf it is argued that the covenant is restricted to the 8 acres of grass land so described at the date of the demise. On the other hand reliance is placed by the plaintiff

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on the generality of the words used and on certain other provisions supporting a wider construction than that contended for by the defendant. The expression "any grass land" extends, it is urged, the operation of the covenant to all land for the time being properly described as grass land irrespective of whether it was grass land at the date of the demise, or subsequently laid down. I think the wider construction is the correct one, and that the covenant is not restricted to such part of the demised premises as were laid down in grass at the date of the demise. In my opinion the context in which the words "any grass land" are placed shows this to be the true construction.

Rush v. *Lucas* (1), where I held the tenant entitled to break up pasture although he was at the time under notice to quit, does not, in my opinion, govern this case. "Any" is a word with a very wide meaning, and prima facie the use of it excludes limitation. On behalf of the defendant it is said that this prima facie meaning is rebutted by the fact that the grass land is identified in the parcels, and that the words "any grass land" are equivalent to "any of the grass land," and if the matter rested on parcels and the covenant alone it is possible that the defendant's contention might prevail. But the context in which the expression occurs, and the difficulty of giving full effect to several of the other clauses in the agreement, in particular the one providing for payment to the outgoing tenant of a proportion of the cake and manure, if the application of the covenant is limited to the 8 acres, appears to me to show that the word "any" in the agreement must be read with full significance. I hold, therefore, that on the true construction of this agreement the covenant is not restricted to the 8 acres, but extends to the grass land in dispute, and therefore that the plaintiff is entitled to the relief he claims in the action. This conclusion disposes also of the counterclaim, but inasmuch as it has been arrived at on a particular view of the construction of the tenancy agreement, and the case may go to another tribunal where a different construction may be adopted, I propose to state my conclusions on the

(1) [1910] 1 Ch. 437.

second cause of action relied upon by the plaintiff, and also upon the defendant's claim to damages on the assumption that the plaintiff makes out no ground for any relief in the action. The plaintiff's second cause of action is based on the allegation that the breaking up of this grass land would have been a breach by the defendant of his covenant to cultivate and manage the land during his tenancy in a husbandlike manner.

On that point the question I have to determine is: Was the defendant's threat in March, 1919, to destroy this grass land and plough it up a threat to do something contrary to a good and husbandlike cultivation and management? In answering that question I must put out of consideration events subsequent to March, 1919. No one could then foresee what the coming season was to be, and in judging of the defendant's attitude I must, as far as possible, confine myself to the question whether, if the landlord had sued in March, 1919, for an injunction on the ground that the defendant's proposal would involve a breach of the covenant now under consideration, the Court would have made an order. In this connection it has to be remembered that tenant and landlord both agreed that the conversion of this land into pasture land was desirable and beneficial to the holding. The threat to change its condition was first made after notice to determine the tenancy had been given, and negotiations for its renewal had determined. Down to that moment of time it may well be that notwithstanding the tenant was under notice to quit, the landlord, although he regarded the tenant's proposal as injudicious, might yet have failed to satisfy the Court that there was anything in it amounting to mismanagement inasmuch as the tenant might, after all, stay on, and in subsequent years prove that his policy had been of advantage to the farm. But as soon as it was clear that the tenancy was to determine in the following September very different considerations arose. It was inevitable that the course of conduct proposed by the tenant must leave this part of the farm in an unsatisfactory and filthy condition in September. Part of the depreciation brought about by this condition would no doubt have to be

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borne by the tenant when the outgoing valuation came to be taken, but the greater part must have fallen on the landlord who would undoubtedly have been called upon to make material concessions to any new tenant coming into a farm in that condition. On the evidence, I come to the conclusion that having regard to these matters the Court would have regarded the proposed dealing with the land at that stage of the tenancy and in the then subsisting circumstances as mismanagement and would have restrained the tenant on the ground that he was contemplating a breach of the covenant to cultivate in a husbandlike manner. The plaintiff is therefore in my opinion entitled to judgment on this cause of action also.

As to the defendant's claim for damages, even if I had come to the conclusion that the covenant against ploughing up the grass land did not extend to this part of the farm and that the defendant was not cultivating the land otherwise than in a husbandlike manner I should not have acceded to it. Had the plaintiff failed in the action he would, of course, have had to pay costs, but it does not follow from this that the defendant would have been entitled to recover any damages on his counterclaim. I have heard a good deal of evidence on the defendant's claim, and it is a matter on which I do not wish to say too much. Perhaps it will suffice therefore, if I say that having heard the wholly satisfactory evidence given on behalf of the plaintiff, I have no difficulty in rejecting the fantastic figures put forward on behalf of the defendant. I give entire credence to the evidence tendered on the part of the plaintiff. So far from the speculation having ever been likely to turn out a profitable one, the defendant would have been considerably out of pocket had he ever embarked upon it.

No further order is required in the action except that the defendant must pay the costs of it, and I dismiss the counterclaim with costs.

Solicitors: *Martineau & Reid; Kenneth Brown, Baker, Baker, for Wannop & Falconer, Chichester.*

G. M.

EVE J.
1920
Jan. 15, 21.

In re FOSTER.

HUNT *v.* FOSTER.

[1919. F. 1248.]

Administration—Will—Trust for Sale—Power to postpone—Residuary Estate—Distribution — Hotchpot — Method of computing Shares of Income—Equality—Deduction of Income Tax—Practice.

Under the will of a testator who died in 1894 his residuary estate (other than a large holding in a private limited company) was held by his trustees upon trust for conversion, with a power to postpone, and the annual rents and profits pending conversion were to be deemed income. The ultimate beneficiaries were two sons and two daughters, the shares of the latter being settled. Pursuant to the testator's will, as construed by an order of Stirling J., made in 1895, shares of this company of the value of 12,029*l.* at the testator's death were transferred by the trustees of the will to each of the testator's sons, to be enjoyed by them as from the date of the testator's death, but subject to their bringing the same into hotchpot. The order further declared that if the sons should receive more in the first instance than the daughters, the latter should have such excess made up to them with interest at 4 per cent. per annum from the testator's death at the ultimate distribution. The bulk of the estate was freehold and remained unconverted. The trustees had dealt with the annual nett income of the estate after paying all outgoings and deducting income tax, by adding two sums of 481*l.* 3*s.* 4*d.*, being 4 per cent. interest on the two sums of 12,029*l.*, and of the total so arrived at one-fourth had been paid or accounted for to each of the daughters, and one-fourth, less 481*l.* 3*s.* 4*d.*, to each of the sons. No income tax had been deducted from the two amounts for interest thus brought in for the purposes of computation:—

Held, that this was hotchpotting "like with unlike" and did not produce equality; that the income of the estate to be brought in as the first item in the computation should be the gross income, before deduction of income tax, and the sums added by way of interest on overpayments should also be brought in at the gross amounts, and when the distributive shares were ascertained, income tax should be deducted from each.

ADJOURNED SUMMONS.

By his will, dated March 29, 1893, George Harvey Foster, of Sheffield, merchant tailor, after appointing executors and trustees, and making certain bequests, directed that his preference and ordinary shares in the private company of W. Foster & Co., Ld., should not be sold, but that the

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ordinary shares should be transferred to his sons who had attained or should attain the age of twenty-four years in equal shares, the income and dividends arising therefrom to be treated as income from their shares in his residuary personal estate, and that the preference shares should be retained by his trustees as part of the shares of his daughters in his residuary estate, but the amounts so received or retained by and for his children should be respectively taken as part of the several legacies of 10,000*l.* given to each of them by his will. And the testator gave to each of his children, the defendant Edith Mary Barnascone, William Joseph Foster, the defendant Beatrice Mary Baines, Charles Vincent Foster, and the defendant, Bernard Harvey Foster, the sum of 10,000*l.*, provided that he or she had attained twenty-four at the death of the testator, or did thereafter attain that age, with interest at 4 per cent. per annum from his death until payment, and after directing that the legacy of 10,000*l.* to each of his daughters and the share of each of his daughters in his residuary estate should not be paid to them but held by his trustees upon trust to invest and pay the income to the same daughter during her life, and after her death upon the trusts specified, the testator devised and appointed the residue of his estate to his trustees upon trust for sale and conversion, and after the payments there specified to invest the balance of the proceeds and pay and divide his residuary trust funds in equal shares to and for such of his children as had attained or might attain twenty-four, and the testator gave his trustees full power to postpone the sale of his residuary real and leasehold estates and the conversion of his residuary personalty for such period as they should think fit, and directed that the rents, profits and dividends and yearly produce of his unsold estate should be deemed annual income for the purposes of the trusts of his will. By a codicil to his will the testator revoked all the legacies and trusts in favour of his son Charles Vincent Foster, and directed that none of the ordinary or preference shares of the company should be allotted or retained by his trustees as part of the legacies

or shares of either of his two daughters, and that he intended such shares to be treated as part or the whole of the legacies and shares of W. J. Foster and B. H. Foster. The testator died on August 8, 1894.

On November 5, 1894, the trustees of his will applied by originating summons to ascertain whether the preference and ordinary shares bequeathed for the benefit of W. J. Foster and B. H. Foster should be brought into account at their nominal or at their real value at the testator's death. By an order made by Stirling J. on February 20, 1895, it was ordered that these shares ought to be brought into account at their actual value at the date of the testator's death; that W. J. Foster and B. H. Foster were entitled to have the ordinary and preference shares transferred to them or retained for them as from the testator's death; and the Court further declared that if, on the shares being valued, W. J. Foster and B. H. Foster should receive more in the first instance than the two daughters of the testator, the latter ought to have such excess made good to them with interest thereon at 4 per cent. per annum from the testator's death, at the ultimate distribution. Pursuant to the testator's will and codicil as construed by this order preference and ordinary shares of the company already mentioned of the value at the testator's death of 12,029*l.* were transferred to each of the two sons to be enjoyed by them as from the date of the testator's death, but subject to their bringing the same into hotchpot as in the order mentioned. The bulk of the residuary estate, consisting of freehold property in Sheffield, still remained unconverted, and except for the transfer of the shares there had been no further distribution. In these circumstances the trustees, adopting what they had been advised to be the course of administration prescribed by the judgments in *In re Poyser* (1) and *In re Craven* (2), dealt with the annual income of the estate by adding to the actual nett income available for distribution, after paying all outgoings and deducting income tax, two sums of 481*l.* 3*s.* 4*d.*, being 4 per cent. interest on the two

(1) [1908] 1 Ch. 828. (2) [1914] 1 Ch. 358.

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sums of 12,029*l.*, representing the value of the shares transferred to the sons; of the total so arrived at one-fourth had been paid or accounted for to each of the daughters, and one-fourth, less 481*l.* 3*s.* 4*d.*, had been paid or accounted for to each of the sons.

W. J. Foster died on October 1, 1900, and his widow, the defendant Mary Elizabeth Foster, was now entitled as his general devisee to his share and interest under the testator's will. She did not agree with the method of computing the share of her husband, which had been acquiesced in by the other son and the two daughters.

On November 18, 1919, the present trustees of the will took out an originating summons asking whether, on debiting the defendants Mary Elizabeth Foster and Bernard Harvey Foster with interest at the rate of 4 per cent. per annum on the two sums of 12,029*l.* (the ascertained value at the death of the testator of the preference and ordinary shares in the company), for the purpose of making up to the defendants Edith Mary Barnascone and Beatrice Mary Baines the excess taken in the first instance by W. J. Foster and B. H. Foster by reason of the transfer to them of the preference and ordinary shares pursuant to the order of February 20, 1895, the plaintiffs, as such trustees, ought in their accounts to deduct income tax at the rate for the time being in force from such interest, or whether such interest should be debited in full against the defendants M. E. Foster and B. H. Foster without such deduction; and (2.) If income tax should be deducted whether the accounts should be readjusted on the footing that income tax should have been deducted therefrom in the past.

H. T. Method for the trustees of the will.

E. Riviere for the surviving son of the testator was willing that the income tax should be deducted.

Gover K.C. and *G. E. Timins* for the widow of the deceased son. Income tax should have been deducted from the two sums of 481*l.* 3*s.* 4*d.* added for interest as income tax was deducted from the gross income derived from the rents of

the estate in the first instance. Otherwise it would be hotchpotting "like with unlike," and equality would not be produced. If no tax is deducted from these two sums, none should be deducted from the gross income in the first instance. Then, when the whole share of each child is ascertained income tax can be deducted from such share. The principle of *In re Poyser* (1) and *In re Craven* (2) will then be followed and the accounts can be recast on that footing. The executors and trustees have not adopted the proper mode of computation in their accounts.

J. W. Manning for the two daughters of the testator. The daughters are satisfied with the method of computation adopted by the trustees since the order of February 20, 1895. The sums brought in for interest at 4 per cent. are merely notional sums for the purpose of computation of the shares of income and no income tax should be deducted. It is a rough and ready rule to make equality as far as possible, and it has not been the practice of the Court to deduct income tax where none was in fact paid. There was no mention in the order of 1895 of income tax deduction on the 4 per cent. interest, or in the cases stated in *In re Poyser* (1) and *In re Craven.* (2). It will necessitate the recasting of the accounts for many years back if what the trustees have done is held to be the wrong method of computation.

It is similar to the calculation of advances made in respect of portions where equality has to be produced: *In re Whiteford* (3); *In re Davy* (4); *In re Willoughby.* (5) There is no obligation to pay the tax here so it should not be deducted. It is an entirely novel claim now raised after many years of dealing with the estate in this manner, and it should have been brought before the Court at an earlier stage.

Gover K.C. in reply. If the mode of adjusting the accounts has been wrong it should be put right.

Cur. adv. vult.

(1) [1908] 1 Ch. 828.
(2) [1914] 1 Ch. 358.
(3) [1903] 1 Ch. 889.
(4) [1908] 1 Ch. 61.
(5) [1911] 2 Ch. 581.

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Jan. 21. EVE J. (after stating the facts and the method of dealing with the estate by the trustees, continued:) With the course adopted by the trustees the daughters and the surviving son have been, and still remain, satisfied, but the widow of the other son, who is now beneficially entitled to the shares and the rest of her late husband's interest in the estate, has raised the objection that if the income of the estate brought into the calculation is the net income after payment of the income tax, the two amounts added for the purposes of computation ought also to be brought in less income tax, or, what is the same objection stated in another way, that if the added amounts are brought in without deduction of tax the income of the estate ought also to be brought in on the same footing. I think the latter is the more correct way of stating the objection, and in my opinion it is a valid one. So stated it disposes of the argument based on the facts that nothing is said in the order of February 20, 1895, as to the 4 per cent. interest being "less income tax" and that no mention of income tax is made in the orders adumbrated in the concluding words of the judgment in *In re Poyser* (1) and stated in terms at the end of that in *In re Craven*. (2) I think the explanation is fairly obvious—the income of the estate which is the first factor to be brought into the calculation is the income before deduction of the tax and not the income less tax. The trustees, when charged with or when paying the tax, are but the agents of the persons beneficially entitled to the income, and when the Court directs the trustees to ascertain and bring in the income of the estate as the first item in the computation the intention is, in my opinion, that the gross income is to be brought in. If this is done the sums added by way of interest on overpayments are in like manner brought in at the gross amounts, and when the distributive shares are ascertained income tax is then deducted from each. Exactly the same result is brought about by bringing in both the income of the estate and the interest on the overpayments less tax,

(1) [1908] 1 Ch. 828. (2) [1914] 1 Ch. 358.

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but the former is, in my opinion, the more accurate mode of procedure.

By the course which has been adopted by these trustees equality, which is the whole object of hotchpotting, has not been brought about; there has been, as was observed in the course of the argument, a hotchpotting of "like with unlike," a process which can never result in equality, and I think that I ought to declare that for the purpose of giving effect to the declaration in the order of February 20, 1895, the income of the estate, to which interest at 4 per cent. per annum on the two sums of 12,029*l.* is to be added for the purpose of computation, is the income before deduction of income tax. The accounts should be readjusted on that footing.

Solicitors: *Sharpe, Pritchard & Co., for Bramley & Son, Sheffield; Ridsdale & Son, for Nicholson & Co., Sheffield; Hancock & Willis, for Wake & Sons, Sheffield.*

G. M.

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In re EARDLEY'S WILL.

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[1919. E. 654.]

Power of Appointment—Special Power—Appointment by Will—Subsequent Appointment by Deed—Ademption—Satisfaction—Mother and Child—Rule against Double Portions.

Testatrix, under her father's will had power with the consent of her husband to appoint by deed or will a fund of 40,000*l.* between her seven children. In 1891, 1892 and 1894 she appointed by deed one equal seventh of the fund to each of three children on the occasion of his or her marriage. In 1895 she appointed by will the remaining four-sevenths between the remaining four children, one of whom was H. In 1899 she appointed by deed one equal seventh of the fund to H. on the occasion of his marriage. These appointments were all made with the consent of the husband of the testatrix and subject to their respective life interests, and each of the four appointments

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by deed comprised an equal seventh of certain other personal property brought into settlement by the husband and similarly appointed by him and the testatrix under a joint power of appointment contained in their marriage settlement. The will of the testatrix also appointed certain real estate to her children successively in tail male, subject to a life interest in her husband, and declared that the same estate should, when and so soon as any child should become entitled thereto in possession, be charged with a sum equal in value to the one-seventh of the 40,000*l.* to which the child so succeeding should have become entitled, such sum to be held in trust for her other children living at her death and the children of any other child who might have died in her lifetime in equal shares per stirpes. The husband survived the testatrix and died in 1916;—

Held, that apart from any presumption against double portions there was sufficient on the face of the documents and in the circumstances of the case to show an intention on the part of the testatrix to insure equality between her children, and that the appointment of one-seventh to H. by the deed of 1899 was intended to be in satisfaction or lieu of the one-seventh already appointed to him by the will.

In re Ashton [1897], 2 Ch. 574; [1898] 1 Ch. 142 discussed.

ADJOURNED SUMMONS.

Under the testamentary disposition contained in his will dated July 6, 1860, and a third codicil thereto dated April 18, 1861, the late Sir Culling Eardley Eardley directed his trustees to raise and retain a sum of 40,000*l.* in trust for his daughter Isabella Maria during her life and after her death (subject to any appointment in favour of her husband) in trust for her children or remoter issue as she should by deed or will, or, if during coverture with the consent of her husband, appoint, with power for his said daughter to appoint a life interest therein in favour of any surviving husband; and the testator thereby settled certain real estate in the county of Hertford subject to the life estate therein of his daughter Frances Selina and on default or failure of her issue (which happened) in trust for his said daughter Isabella Maria for her life and after her death (subject to any appointment in favour of a surviving husband) upon trusts in favour of her children or remoter issue as she should by deed or will, or, if during coverture with the consent of her husband, appoint.

The said testator died on May 21, 1863, and the said sum of 40,000*l.* was duly raised after his death and invested by the trustees of the will.

On August 6, 1863, the said Isabella Maria Eardley (hereinafter called the testatrix) married William Henry Freemantle, and by her marriage settlement dated August 5, 1863, she appointed to her husband if surviving her and if there was issue of the marriage, a life interest in the said sum of 40,000*l.*; and by the same settlement certain personal estate belonging to the husband, consisting of ordinary railway stocks of some 3,530*l.* nominal value, was assigned to the trustees upon trust for the husband and the testatrix successively for life and after the death of the survivor in trust for the issue of the marriage as the husband and the testatrix should by deed jointly appoint.

There was issue of the marriage nine children, two of whom died in infancy. The other seven, each of whom attained twenty-one, were (1.) William Archibald Culling, who died in the lifetime of the testatrix leaving issue, (2.) Isabella Louisa, the wife of C. H. Aitken, (3.) Anna Mary, the wife of F. S. Parry, (4.) Francis Edward, (5.) Henry Eardley Stephen, (6.) John Morton, and (7.) Stephen Frederick.

In 1891 Anna Mary married F. S. Parry, and on the occasion of her marriage by a deed poll dated September 30, 1891, under the hands and seals of the testatrix and her husband, the testatrix in exercise of her power under her father's will and codicil and with the consent of her husband appointed that after the death of the survivor of them one-seventh share of the fund of 40,000*l.* should be held in trust for the said Anna Mary Parry; and in exercise of their joint power of appointment conferred on her husband and the testatrix by their marriage settlement her husband and the testatrix made a similar appointment of one-seventh share of the personal estate brought into settlement by the husband.

On the occasion of his marriage in 1892 a precisely similar appointment by deed poll was made in favour of William Archibald Culling; and on the occasion of her marriage in 1894 a precisely similar appointment by deed poll was made in favour of Isabella Louisa.

The testatrix executed her will on December 27, 1895. The will recited the will and codicil of her father, the settlement

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made on her marriage conferring a life interest in the 40,000*l.* on her husband and bringing into settlement the personal property settled by her husband, and the three appointments made by the three deeds poll of 1891, 1892 and 1894, and continued: "And whereas I am desirous of appointing the residue of the said fund amongst my other children and also of making such other appointments as are hereinafter contained, now in exercise of the said power for the purpose given to me by the said will and codicil and of every or any other power and authority in any wise enabling me in this behalf I do hereby with the consent of my said husband the said William Henry Freemantle testified by his signing this my will appoint that the trustees for the time being of the said will and codicil shall from and after the decease of the survivor of my said husband and myself stand possessed of the remaining four equal seventh parts of the said sum of 40,000*l.* or the stocks funds or securities then representing the same in trust for my said children Francis Edward, Henry Eardley Stephen, John Morton, and Stephen Frederick in equal shares; and in exercise of the said power for this purpose given to me by the said will and codicil over the Hertfordshire estate and other the property of which my said sister is now under the will and codicil tenant for life in the event of my said sister dying without issue, and of every or any other power in any wise enabling me in this behalf, I do hereby with the like consent appoint that the said trustees of the said will and codicil shall after the decease of the survivor of my said sister and myself stand possessed of the said Hertfordshire estate and all other property subject to such power, in trust for my said husband during his life and after his decease (charged and chargeable as hereinafter mentioned) in trust for my said son Francis Edward in tail male with remainder in trust for my said son Henry Eardley Stephen in tail male with remainder in trust for my son John Morton in tail male with remainder in trust for my said son Stephen Frederick in tail male with remainder in trust for my said daughter Isabella Louisa Aitken in tail male with remainder in trust for my said daughter Anna Mary Parry in tail male;

and I hereby with the like consent appoint and declare that the said Hertfordshire estate and other property shall, when and so soon as any child or grandson or more remote male issue of mine shall become entitled thereto in possession under the appointment aforesaid, stand and be charged with the payment of such sum as shall be the amount or value of the one equal seventh of the said sum of 40,000*l.* or the stocks funds securities or property representing the same, to which the child or the parent or ancestor of the grandson or more remote male issue so succeeding shall have become or be entitled together with interest thereon after the rate of 3*l.* 10*s.* per cent. per annum computed from the time of such son or daughter or grandson or more remote male issue of mine becoming entitled to such possession as aforesaid; and I appoint and declare that the said sum so charged and the interest thereof shall be in trust for all such of my other children as shall be living at my death and the children of any other child of mine who may have died in my lifetime (including my said eldest son now deceased) if more than one as tenants in common in equal shares per stirpes."

Henry Eardley Stephen married in 1899, and on the occasion of his marriage by a deed poll, dated April 19, 1899, under the hands and seals of the testatrix and her husband, an appointment was made in his favour of one-seventh share of the fund of 40,000*l.* and of one-seventh share of the personal estate brought into settlement by the husband precisely similar to the three previous appointments of 1891, 1892 and 1894; and by an indenture of the same date the said Henry Eardley Stephen assigned the one-seventh share of the said fund of 40,000*l.* appointed to him by the last-mentioned deed poll and all other the part or parts to which under any appointment or otherwise he then was or might thereafter become entitled in the same fund unto the trustees of the settlement upon the trusts therein mentioned.

The testatrix died on July 13, 1901.

Frances Selina (then Mrs. Hanbury) died on March 19, 1916, a widow, and without issue.

The testatrix's husband died on December 24, 1916, and

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the son Francis Edward then succeeded in possession to the Hertfordshire estate under the provisions of the testatrix's will.

This was an originating summons taken out by the trustees of the will and codicil of Sir Culling Eardley Eardley deceased for the determination of the following questions: (1.) Whether, having regard to the several appointments made by the testatrix in exercise of her special power of appointment over the said sum of 40,000*l.* under the said will and codicil of Sir Culling Eardley Eardley and in the events which had happened, the trustees of the said settlement of April 19, 1899, were entitled to any and what part of the sum remaining after satisfying the four appointments (each of one-seventh of the whole) made by the four deeds poll of 1891, 1892, 1894 and 1899, or whether, if they were entitled to any such share, they were bound to give credit for all or some and what part of the one-seventh share appointed by the said deed poll of April 19, 1899, and assigned to them by the said settlement of that date; and (2.) Whether, having regard to such several appointments and in the events which had happened, the Hertfordshire estate was under the appointment made by the will of the testatrix subject to a charge of an amount equal to one-seventh part of the said sum of 40,000*l.* or some other and what amount?

F. McMullan for the plaintiffs.

W. G. Hart for Henry Eardley Stephen. The case is on all fours with *In re Ashton* (1), which is a direct authority that the rule against double portions does not apply to a gift or appointment by a mother to her son. It is true that the decision of Stirling J. in that case was reversed on appeal but only on the facts—further evidence having been put in before the Court of Appeal—leaving the law as stated by Stirling J. *In re Ashton* (1) was cited before Buckley J. in *In re Tancred's Settlement* (2) and before Joyce J. in *In re Peel's Settlement* (3) without any disapproval. The effect is

(1) [1897] 2 Ch. 574; [1898] 1 Ch. 142.

(2) [1903] 1 Ch. 715.

(3) [1911] 2 Ch. 165.

to give to Henry Eardley Stephen one-seventh share under the appointment by the deed and one-fourth share of the remaining three-sevenths remaining subject to the appointment by the will. The text-books adopt the law as stated by Stirling J.: White and Tudor's L.C., 8th ed., vol. ii., p. 385; Farwell on Powers, 3rd ed., pp. 448, 456; Jarman on Wills, 6th ed., p. 854; Theobald on Wills, 7th ed., p. 759; Ashburner's Principles of Equity, p. 683.

Rolt K.C. and *Roscoe* for persons claiming under the settlement made by Henry Eardley Stephen supported the same argument. The rule against double portions has no application to an appointment made by a mother. The principle of that rule is based on the duty of a father to provide for his children: *Ex parte Pye.* (1) There is no such obligation in the case of a mother: *In re Ashton.* (2)

[SARGANT J. referred to *In re Dawson.* (3)]

It is true that by the terms of the power the appointment by the mother required the consent of the father, but that did not render the share appointed by the mother a portion in the technical sense. There is no evidence to show that the testatrix intended the appointment to operate exclusively on the share comprised in the deed poll of 1899, and *In re Tancred's Settlement* (4) is distinguishable.

Ashworth James for Francis Edward and John Morton Freemantle. Quite independently of any presumption or rule against double portions, looking to all the circumstances of the case the intention of the testatrix plainly was to preserve equality amongst her children and to give to Henry Eardley Stephen no more by the appointment of 1899 than he would have taken under the will. The appointment to him on the occasion of his marriage only rendered certain and indefeasible what was defeasible under the will. Whether he claims under or dehors the will, he must admit the validity of the appointment of the three-sevenths to the three other children. The general intention of the testatrix can be

(1) (1811) 18 Ves. 140.
(2) [1897] 2 Ch 574; [1898] 1 Ch. 142.
(3) [1919] 1 Ch. 102.
(4) [1903] 1 Ch. 715.

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gathered from the documents and the state of the family without any recourse to the doctrine against double portions : *In re Tancred's Settlement* (1) ; *England* v. *Lavers.* (2)

If necessary, however, I submit that the present case falls within that doctrine, having regard to the fact that the appointment could only be made by the mother with the consent of the father.

[He also referred to *In re Ashton* (3) ; *In re Dawson* (4); *In re Peel's Settlement* (5) ; and *In re Tancred's Settlement.* (1)]

Horsley, Broughton and *P. M. Walters* for other parties in the same interest supported the same argument.

Rolt K.C. in reply.

Cur. adv. vult.

Dec. 3. SARGANT J. read the first question raised by the summons and continued : The question shortly stated is what was the effect of the last appointment by deed poll in 1899 having regard to the appointment made by will in 1895 and the three earlier appointments by deeds poll ?

On behalf of those who contend that the last appointment did not operate exclusively on the one-seventh share of the last appointee the matter has been argued from the point of view suggested by the absence in the present case of any presumption against double portions such as arises in the case of an appointment by a father or person standing in loco parentis ; and from that narrow point of view I agree that a great deal may be said for the contention that the appointment in question did not operate exclusively on the one-seventh share of the last appointee. In my judgment, however, the matter must be regarded from a wider point of view. It is clear that in all cases of ademption or satisfaction the question is one of intention to be gathered in various ways. It is true that in certain cases where the relationship of father and child or the relationship of a person who has placed himself in loco parentis to the objects of his bounty, exists, the law itself raises certain presumptions ;

(1) [1903] 1 Ch. 715.
(2) (1866) L. R. 3 Eq. 63.
(3) [1897] 2 Ch. 574 ; [1898] 1 Ch. 142.
(4) [1919] 1 Ch. 102.
(5) [1911] 2 Ch. 165.

and the result is that unless those presumptions can be rebutted a certain result follows which in many cases may have the effect of defeating rather than of effectuating the true intention. But those presumptions do not by any means cover the whole ground; they are only some of the methods of ascertaining the intention, which is to be gathered from all the circumstances of the case, from which, even where the relationship of father and child in the strict sense exists, an intention may still be found which has the result of the child taking a double share. The intention may be an intention actually expressed in words or it may be an intention irresistibly drawn from all the circumstances of the case. It is difficult to find the general proposition stated, but in Halsbury's Laws of England, vol. xiii., p. 128, para. 147, I find this statement: "Satisfaction is the donation of a thing with the intention that it shall be taken either wholly or partly in extinguishment of some prior claim of the donee. It may occur (1.) when a covenant to settle property is followed by a gift by will or settlement in favour of the person entitled beneficially under the covenant; (2.) when a testamentary disposition"—that is the present case—"is followed during the testator's lifetime by a gift or settlement in favour of the devisee or legatee; and (3.) when a legacy is given to a creditor. In all these cases the question of satisfaction is one of the intention of the settlor or testator; and if he expressly declares that the later disposition is to be in satisfaction of the earlier obligation or disposition, the matter is governed by this expression of his intention, and effect is given to the later disposition accordingly. In the absence of such expression, certain presumptions as to his intention are raised. . . . ." The next paragraph proceeds: "In the cases of a portion followed by a legacy, and of a legacy followed by a portion, where the gifts are substantially of the same nature and in favour of the same person, there arises a presumption of satisfaction (1.) where the settlor and testator is the father of the donee, or has placed himself in loco parentis to the donee; (2.) where the first disposition is expressed to be made for a specific purpose, and the second

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disposition effects that purpose." A little later down it is stated: "The presumption arises also as regards two dispositions, both made for the purpose of satisfying a specific moral obligation." I quote that passage for the purpose of emphasizing that the cases are not merely cases where a presumption arises drawn by law from the existence of a certain relationship, but that the question also arises in all other cases where the intention is not presumed from the mere relationship but can be arrived at from a consideration of the whole circumstances of the case.

Now here on a just consideration of all the circumstances it seems to me very difficult to draw any other conclusion than that the last appointment was made by way of satisfaction or ademption of the provision that had been made for the appointee in question by the antecedent will. The facts are shortly these. [His Lordship referred to the power of appointment created by the will of the testatrix's father, to the settlement made on her marriage, and to the three appointments of 1891, 1892 and 1894, and to the provisions of the testatrix's will—observing that the careful provision charging the Hertfordshire estate with a sum equivalent in value to the one-seventh share of the 40,000*l.* appointed in favour of the person becoming entitled to that estate, was obviously intended to secure absolute equality amongst the six children other than the one who might become entitled to that estate—and after referring to the subsequent appointment by the deed poll of 1899 continued:] As regards all these appointments it is impossible to avoid seeing that the object of the lady and of her husband carried out in the most minute and elaborate way was absolute equality between their children. They obviously intended to put this son Henry Eardley Stephen on precisely the same footing as that on which the three children who had married previously to her will were placed. No further appointment was made. The lady and her husband are both dead, and the question now is what is the operation on her will of the last appointment of 1899?

The first thing to remark is that the appointment of 1899

necessarily adeems in some way or another the provision made by the testatrix's will because the will has appointed four separate sevenths—one to each of the four children named—and there was nothing therefore left to be dealt with by her except by way of ademption, that is, by taking away something which had been given by the will. Therefore it seems to me that the only true alternatives before the Court are, either to say that the appointment was an appointment to the son Henry Eardley Stephen of the one-seventh share which had already been appointed to him by the will, or to say that it was an ademption of one-quarter of each of the four seventh shares appointed to him and to the other three children named under the will. Ademption of some kind was bound to take place by virtue of this document; the question is what sort of ademption? To my mind it is absolutely clear that the intention of the testatrix down to and including the time of this appointment so deliberately made with the consent of her husband, was to continue amongst all her children the equality which had previously been so elaborately provided for. That could only be effected by construing the appointment made in favour of Henry Eardley Stephen as being an appointment to him of the very same one-seventh share which had been given to him by the will. The object plainly was that in view of his marriage he should have some certain provision not dependent on a possible revocation, and accordingly by the deed of 1899 a provision was made for him similar to the provisions which were previously made for the three other children who had married. I cannot read this document or consider the position of the family without being driven irresistibly to the conclusion that that was the real intention of the testatrix, and that it was not her intention to do the only other thing which these documents could effectuate—namely, to take away from each of the four children to whom no appointment otherwise than by will had up to then been made, one-fourth of the four seventh shares which had been appointed by will to them separately, to concentrate the one-seventh so taken away into the hands of

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Henry Eardley Stephen alone and to leave the remaining three sevenths to go equally among the four. The net result of this latter alternative would be that Henry Eardley Stephen would take seven twenty-eighths of the entire fund of 40,000*l.*, and that each of the other three children would take three twenty-eighths only of the fund, and that while the fund of 40,000*l.* would thus go in unequal fractions the property brought into settlement by the father would still go in equal fractions. In my judgment no one, whether lawyer or layman, can come to any other conclusion than that the intention of the testatrix in executing the last deed poll was to preserve the equality which had hitherto been maintained and not to disturb it in the flagrant way which this latter alternative would involve.

Now taking that view of the intention of the parties, is there anything in the decided cases to prevent me from coming to the conclusion at which I have arrived on the face of the documents? I cannot find anything. The three cases cited to me—*In re Tancred's Settlement* (1); *In re Peel's Settlement* (2); and *England* v. *Lavers* (3)—are all in favour of the view which I have taken. The only authority which may at first sight seem to be antagonistic to that view is *In re Ashton* (4) as decided by Stirling J. in the Court of first instance. What happened there was this. After the case had been decided by Stirling J., for whose decisions we all entertain the most profound respect, it was taken to the Court of Appeal, and there certain further evidence was adduced from which the Court of Appeal was enabled to come to a more satisfactory decision than that which had been arrived at by the learned judge in the Court below. But it is urged before me that the Court of Appeal was only enabled to arrive at that decision on that further evidence, and that for the purpose of considering the law in cases where evidence of a similar kind cannot be furnished the law is accurately stated by Stirling J. I think that the law is

(1) [1903] 1 Ch. 715.
(2) [1911] 2 Ch. 165.
(3) L. R. 3 Eq. 63.
(4) [1897] 2 Ch. 574.

probably quite accurately stated by Stirling J. from the point of view with which he was dealing—namely, whether the presumption against double portions can be said to arise in a case where the father is not the appointor; and, if for the purpose of my decision in the present case, I were forced to rely on some presumption of law in favour of the view which I have taken, *In re Ashton* (1) would be an authority which I should have to consider most carefully before I ventured to differ from the decision of Stirling J. But in the present case I am not for the purpose of my decision relying upon any presumption of law; I am only looking at all the facts of the case to enable me to determine the intention of the parties apart from and independently of any presumption of law. In *In re Ashton* (1) Stirling J. held that there was no presumption of law on which he could act. When the case went to the Court of Appeal further evidence was adduced. It was shown from facts contemporaneous with the appointment that it was made really by way of anticipation of the benefit given by the will and that there had been an acceptance by the appointee of that provision. And in that state of facts the short report of the case in the Court of Appeal (1) after stating the nature of the evidence concludes: "The Court without discussing the question of law dealt with by Stirling J. in the Court below, namely, as to the application of the rule against double portions, decided the appeal solely upon the two letters and the affidavit above mentioned, and came to the conclusion that upon the evidence it was indisputable that Mrs. Papillon had accepted the two appointments of 2,000*l.* and 1,333*l.* 6*s.* 8*d.* as on account and in prepayment of her one-third of the 10,000*l.* appointed by the will, and was therefore now debarred from insisting to the contrary. Their Lordships treated the case as equivalent to that of a legacy given by will of a sum of money, and of a payment by the testator in his lifetime to the legatee in anticipation." It has been said that the decision of the Court of Appeal is not applicable to the present case because there is no evidence

(1) [1897] 2 Ch. 574; [1898] 1 Ch. 142, 143.

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here of an acceptance by Henry Eardley Stephen of the appointment to him as being in satisfaction of the one-seventh share appointed in his favour under the will. It is quite true that the present case differs from *In re Ashton* (1) in that respect. But in my judgment the acceptance by the appointee of the substituted provision was not a necessary condition of arriving at the conclusion at which the Court of Appeal arrived. All that was necessary to be shown was a clear intention of the testatrix to make the appointment by way of satisfaction or antecedent satisfaction of the provision made by her will. And if in that case the evidence had stopped short of showing any acceptance by the appointee and had merely shown a contemporaneous intention on the part of the appointor to make the appointment in question by way of satisfaction of that which had been inchoately given by the will, I am of opinion that such evidence would by itself have been sufficient for the purpose, having regard to the cases referred to in paras. 147 and 148 of the text-book which I have read.

One other point deserves mention. In addition to the two possible intentions which might be attributed to the testatrix, there is a third possibility ; that is, that the testatrix in making the appointment by deed in 1899 had no deliberate intention at all, and that being so, the joint operation of that appointment and the will as they stand must result in diminishing the provisions made for each of the four children named in the will to an extent sufficient to make the appointment good. It may be that if the testatrix made this appointment without taking into consideration what had been previously done, that result might have followed; but in my judgment that view of the case is excluded by the careful terms of the appointment following the precise language of the three previous appointments which were made by deed and obviously prepared under the advice of the family solicitors. It is hopeless to my mind to contend that the lady had no intention one way or the other in the matter, and I infer as a conclusion of fact that she was well aware of all that has been

(1) [1898] 1 Ch. 142, 143.

previously done and had a definite intention in making the appointment, and that of the two possible definite intentions which can be attributed to her, the one which I have mentioned is the true intention. In my judgment therefore the appointment of 1899 operated to give to Henry Eardley Stephen the one-seventh share which had been given to him already by the will—in other words it substituted the one-seventh share comprised in the deed for the one-seventh share appointed to him by the will, leaving the other three-seventh shares to pass to the other three children named in the will. In the result, the fund of 40,000*l.* is divisible in equal seventh shares between the seven children, or persons claiming under them respectively, and the Hertfordshire estate is subject to a charge for an amount equal to one-seventh of that fund.

Solicitors : *Frere, Cholmeley & Co. ; Walters & Co. ; Shaen, Roscoe & Co. ; Williams & James ; Warrens ; Kirby, Millett & Ayscough.*

A. C.

Considered. BURGESS *v.* COX. [1950] 2 All E.R. 1212.

Considered. B[illegible] *v.* COX [1951] 1 [illegible]

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[1919. S. 1108.]

Vendor and Purchaser—Contract to sell—Sufficiency of Memorandum—Purchaser not named—Identification—Connecting Documents—Receipt—Type-written contract—Carbon Copy—Parol Evidence—Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 4.

The defendant's authorized agent signed for him as "vendor" a carbon copy of a type-written "contract" not containing any purchaser's name, by which "I agree to purchase" premises described at a sum named, to pay a deposit, to complete within a limited time and in default pay interest on the balance of purchase-money, the vendor to show a good title. The plaintiff had signed the original of which the carbon was a duplicate, and given a cheque for the deposit, a receipt signed by the defendant's agent being put on the carbon copy. In an action for specific performance :—

Held, that—(1.) by incorporating the cheque into the carbon document; or (2.) by connecting the carbon with its original; or (3.) by identifying

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the person who paid the deposit with the plaintiff—there was a sufficient memorandum within the Statute of Frauds.

Long v. *Millar* (1879) 4 C. P. D. 450; *Pearce* v. *Gardner* [1897] 1 Q. B. 688; *Carr* v. *Lynch* [1900] 1 Ch. 613 applied.

Whether two documents, which do not in terms or by inference refer to one another but, when placed physically side by side, show obviously that they were produced at the same time and to that extent formed a single document, can be connected for the purpose of constituting a memorandum under the statute, quaere.

WITNESS ACTION.

The plaintiff and the defendant agreed for the sale by the defendant and the purchase by the plaintiff of certain premises described in, and on the terms of, a written document, signed by the defendant's agent, as follows :—

CONTRACT.

Stamp (6*d.*) *February* 24, 1919.

I agree to purchase the Kingston Brewery premises and land adjoining, together with the shop and cottages, which cover the part of the plan coloured pink, for the sum of two thousand pounds (2000*l.*). I will pay ~~one hundred pounds~~ fifty pounds (50*l.*) ~~(100*l.*)~~ C. P. C. deposit and will complete in three months, but should I not be able to complete at the end of the third month I agree to pay five per cent. per annum on the balance of the purchase money, but in any case I will settle at or before the end of six months from this date. The vendor must show a good and marketable title.

CONYNHAM PETERS CROSS (CROSS & CROSS),
Agent for E. G. WHICHER, Esq., Vendor.

The above-mentioned fifty pounds (50*l.*) received with thanks.—C. P. CROSS.
24/2/19.

This document was a carbon copy or duplicate of a type-written original, which was signed by the plaintiff. The plaintiff drew and gave a cheque dated February 24 to the order of Messrs. Cross & Cross for the deposit. The order

in which the transaction was carried out was (1.) alteration of amount of deposit; (2.) signature of original by plaintiff; (3.) cheque given; (4.) receipt inserted; (5.) signature of carbon by defendant's agent.

The plaintiff brought this action for specific performance.

The question was whether there was a sufficient note or memorandum to satisfy the Statute of Frauds.

Clauson K.C. and *Wilfrid Hunt* for the plaintiff. The memorandum need not be contained in one document, but may be made out from several if they can be connected together. Formerly, to connect two documents, one must contain some reference to the other. Now a wider rule prevails. Thus the meaning of any general expression used in any document may be explained by parol evidence. If, therefore, there is a document signed by a party to be charged, which refers to an agreement signed by him, but in such terms that the description of the agreement is obviously incomplete, evidence may be given to show what that agreement is, and, if the evidence so adduced comprise another document containing all the terms of the agreement, or the terms not specified in the first document, the two documents may be read together as a sufficient memorandum, although the evidence connecting them be parol only. Parol evidence has been admitted to connect a signed letter referring to an agreement to purchase land with another document giving the terms of purchase; to connect a letter containing a promise to grant a lease for years "at the rent and terms agreed upon" with another document in which the rent and terms were specified; and to show that the purchase referred to in a signed receipt for "a deposit of the purchase" was an agreement for purchase of which the terms were contained in a memorandum signed by the purchaser. A letter saying "I accept your offer" may be shown by parol evidence to refer to another in which the terms are stated, and the two together will establish a contract. So a letter to "Dear Sir" may be connected with the envelope on which is the purchaser's name: Williams' Law of Vendor

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and Purchaser, 2nd ed., vol. i, pp. 7–9; *Long* v. *Millar* (1); *Carr* v. *Lynch* (2); *Pearce* v. *Gardner* (3); *Last* v. *Hucklesby*. (4) Here, connecting the documents together, there is a sufficient memorandum.

Maugham K.C. and *Dighton Pollock* for the defendant. There is nothing in the document signed by Cross to show that the defendant has agreed to sell. The description of him as "vendor" does not lead to the necessary inference that he agrees to sell on the terms set forth. It need not mean more than an offer by the plaintiff to buy on terms which the defendant will consider: Fry on Specific Performance, 5th ed., p. 256, § 504, p. 268, § 524.

There is no reference in the document to any other document so as to connect them together: *Taylor* v. *Smith*. (5) *Long* v. *Millar* (1) is the high-water mark against the defendant. It can be predicated of a letter and an envelope, as in *Pearce* v. *Gardner* (3), that they form one missive, but it cannot be predicated of the document here that there is any other. *Oliver* v. *Hunting* (6) was plainly within the rule. There must be a reference to a second document: Fry on Specific Performance, 5th ed., p. 275, §§ 538, 540.

[RUSSELL J. In §. 542 the ground seems entirely shifted.]

That paragraph is the editor's, not the author's. There must be no substantial doubt of the reference. What is stated in § 540 is borne out by Lord Herschell in *Taylor* v. *Smith* (7) and is correct. Here the only reference is to "I." But "I" is not and cannot be a document. The reference to be sufficient must be to a document.

[RUSSELL J. What of the purchaser not being named?]

In *Carr* v. *Lynch* (2) a person had actually paid a fine of 50*l*. That was held sufficient. It is a different case from this. *Coombs* v. *Wilkes* (8), though it does not actually deal with the point, throws some light upon it.

Clauson K.C. in reply. It does not matter whether Cross's

(1) 4 C. P. D. 450.
(2) [1900] 1 Ch. 613.
(3) [1897] 1 Q. B. 688.
(4) [1914] W. N. 157.
(5) [1893] 2 Q. B. 65.
(6) (1890) 44 Ch. D. 205.
(7) [1893] 2 Q. B. 69.
(8) [1891] 3 Ch. 77.

signature was put before "vendor" was or after. It equally authenticates the document: *Ogilvie* v. *Foljambe* (1); *Lobb* v. *Stanley*. (2)

On the true construction of the document there is sufficient reference to justify parol evidence to show what the real transaction was, and, if that transaction was in writing, the writing may be seen: *Cave* v. *Hastings* (3); *Studds* v. *Watson* (4); *Wylson* v. *Dunn* (5); *Pearce* v. *Gardner* (6); *Sheers* v. *Thimbleby* (7); *Last* v. *Hucklesby* (8); *Carr* v. *Lynch* (9); *Auerbach* v. *Nelson* (10). *Oliver* v. *Hunting* (11) is the widest statement and very good sense. The tendency of the law has been towards good sense. If that case is right, it covers this. *Taylor* v. *Smith* (12) seems at first sight inconsistent with it, but is not really so. *Coombs* v. *Wilkes* (13) is one of a different line of cases altogether. The result of the authorities is satisfactorily stated in Williams' Law of Vendor and Purchaser, 2nd ed., vol. i., pp. 7 et seq.

If there exist two documents and, putting them together side by side, it is clear there is some connection between them, that admits parol evidence as to the circumstances under which they came into existence. Here there is the typewritten original and the exact counterpart or duplicate in the carbon copy, and it would, as A. L. Smith L.J. said in *Sheers* v. *Thimbleby* (14), be "sheer affectation" to pretend they are not connected: *Long* v. *Millar*. (15)

Dighton Pollock in reply on cases. *Wylson* v. *Dunn* (5) and *Oliver* v. *Hunting* (11) have gone beyond the law and are much too wide. *Sheers* v. *Thimbleby* (7) is very difficult.

RUSSELL J. after considering the evidence. There remains to consider the questions of law, and in considering them I am entitled to treat the document as signed by Mr. Whicher

(1) (1817) 3 Mer. 53.
(2) (1844) 5 Q. B. 574.
(3) (1881) 7 Q. B. D. 125.
(4) (1884) 28 Ch. D. 305.
(5) (1887) 34 Ch. D. 569.
(6) [1897] 1 Q. B. 688.
(7) (1897) 13 Times L. R. 451.
(8) [1914] W. N. 157.
(9) [1900] 1 Ch. 613.
(10) [1919] 2 Ch. 383.
(11) 44 Ch. D. 205.
(12) [1893] 2 Q. B. 65.
(13) [1891] 3 Ch. 77.
(14) 13 Times L. R. 452.
(15) 4 C. P. D. 450.

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himself, through his agent, lawfully authorized in that behalf. The first question is whether there is any agreement in terms by the defendant Whicher to sell. It is a matter purely of construction of the document which has Mr. Cross's signature. I get, from the document itself, that it is signed by Mr. Whicher (through his authorized agent) under the description of "vendor," that is, vendor of the property described in the document. It shows that 50*l.* has been paid by the purchaser to the vendor's agent as a deposit and part of the purchase-money. I get that from the reference to the 50*l.* and the reference to payment of interest upon the balance of the purchase-money. Thirdly, the document casts upon the vendor an obligation to show a good and marketable title to the property sold. Finally, the document is called a "contract." I can conceive no reason why the document should be signed by the defendant except as a party to be bound—namely, for the purpose of recording the fact that the person who signs it as vendor is liable as vendor to sell to somebody the property described in the document, and that the terms of the sale are to be found in the document. Looking at those details, I have no doubt that the true construction of the document is that the signature by Mr. Whicher through his agent means, and means only, that he thereby agrees to sell, to some individual, the property comprised in the document and upon the terms therein stated. So upon the first point I decide that it is a contract by which Mr. Whicher, by his duly authorized agent, binds himself to sell to somebody the property named in the document.

That leads up to the remaining point. It is said that, assume it to be so, yet there is not a sufficient memorandum signed by Mr. Whicher, or his agent, within the Statute of Frauds, because the document does not say who the purchaser is, but only says "I." First, can I ascertain, either from the document itself, or with the assistance of properly admissible evidence, or from some other document sufficiently connected with it to be read with it, who is meant by "I"? I will not refer to all the

authorities. The most important is *Long* v. *Millar*. (1) It was an action by a purchaser against the alleged vendor. The purchaser had signed a document containing all the terms of the purchase. The only document signed by the defendant was a receipt for the deposit in the following terms: "Received of Mr. George Long the sum of 31*l*. as a deposit on the purchase of three plots of land at Hammersmith." That document, although it contained the purchaser's name and some description of the land sold, contained nothing from which the price could be ascertained. The 31*l*. might be any percentage of the purchase-money. It was argued that there was no sufficient memorandum within the statute. But the Court held that there could be got out of the document, though not on the actual face of it, a reference to some other documentor transaction. The Lords Justices read the receipt as a reference to a deposit on an agreement to purchase, and then said: "We are at liberty to inquire what that agreement is, and we find it to be a document in writing; it is an agreement referred to in the receipt, and the two can be read together." That is what the case decided. Bramwell L.J. puts it in this way (2): "But the point to be established by the plaintiff is that the defendant has bound himself, and a receipt was put in evidence signed by him, and containing the name of the plaintiff, the amount of the deposit, and some description of the land sold. The receipt uses also the word 'purchase,' which must mean an agreement to purchase, and it becomes apparent that the agreement alluded to is the agreement signed by the plaintiff, so soon as the two documents are placed side by side. The agreement referred to may be identified by parol evidence." Baggallay L.J. agrees with him: "The true principle is that there must exist a writing to which the document signed by the party to be charged can refer, but that this writing may be identified by verbal evidence. I think that in the present case by the words 'purchase of three plots of land' the receipt sufficiently refers to the document signed by the plaintiff"; and Thesiger L.J. puts it on the

(1) 4 C. P. D. 450. (2) 4 C. P. D. 454, 455.

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same ground: "This document is somewhat informal, and does not contain such language as we should expect a lawyer to use; nevertheless, it contains all the terms necessary to create a valid contract except the name of the vendor; and the receipt contains the word 'purchase,' which must refer to the purchase of the plots of land mentioned in the document signed by the plaintiff; if we read the two instruments together, we shall not be unduly straining the law by holding that the two, taken together, form a complete contract; our decision will not go beyond the decisions in *Allen* v. *Bennet* (1) and in *Baumann* v. *James*. (2) If the two documents can be connected together, the objection fails that no vendor is named. These documents were meant to be exchanged between the parties; the one was drawn up with the intention that it should operate as a complete agreement; the other contained an acknowledgment of the payment of the deposit; they were respectively signed by the parties, both of whom, it must be taken on the findings of the jury, intended to bind themselves personally." *Long* v. *Millar* (3) comes to this: that, if you can spell out of the document a reference in it to some other transaction, you are at liberty to give evidence as to what that other transaction is, and, if that other transaction contains all the terms in writing, then you get a sufficient memorandum within the statute by reading the two together.

Pearce v. *Gardner* (4) was another case referred to. There the Court of Appeal held that you could unite and read together two documents which were physically separate—namely, a letter and the envelope in which it had been contained. The principle seems to be that the existence of a letter sent by post presupposes the existence of an envelope containing it; therefore, the two can be read together, because there is an inferential reference in the letter to the envelope. *Carr* v. *Lynch* (5), before Farwell J., which I will refer to later upon another point, belongs to a rather different class of cases.

(1) (1810) 3 Taunt. 169.
(2) (1868) L. R. 3 Ch. 508.
(3) 4 C.P.D. 450.
(4) [1897] 1 Q. B. 688.
(5) [1900] 1 Ch. 613.

Mr. Clauson has put his case upon a higher platform and said that, even if you do not get any reference, either inferential or otherwise, in the second, the defective, document to the first, the authorities go to show that if, placing the two documents side by side, there is, upon an inspection of them, such a physical state of affairs that it is obvious that they were produced at the same time and that they originally, to that extent, formed a single document, you can take them and read them together, even though one document does not by inference or in terms contain a reference to the other. There is some colour for that proposition in *Oliver* v. *Hunting* (1) before Kekewich J., and more still in the later case before the Court of Appeal of *Sheers* v. *Thimbleby*. (2) However that may be, I do not propose to decide this case upon that broad ground, because I have come to the conclusion that, upon this document as it stands, I can find in it a sufficient reference to another document which contains the necessary terms.

The difficulty caused by the Statute of Frauds in this case can be overcome in two or three ways. First, I think this is a document which shows on its face a payment on the same date, February 24, 1919, of 50*l.* part of the purchase-money of 2000*l.*, as a deposit to the vendor. There has been produced a cheque for 62*l.* signed by the plaintiff in favour of Messrs. Cross & Cross bearing the same date, and that cheque has been proved to include the 50*l.* I am of opinion that I am at liberty to connect these two documents, read them together and so ascertain the purchaser's name : and thus I get what, in my view, is a sufficient memorandum under the statute.

Another way in which the difficulties of the statute can be answered is this : the document is, as is quite obvious to the eye, a carbon duplicate of another document. It is called a contract. The parties to the contract are the vendor who signs that particular document and someone else who is there mentioned as "I." That involves that "I" has contracted, for otherwise there would

(1) 44 Ch. D. 205. (2) 13 Times L. R. 451.

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be no contract. "I" must have bound himself, otherwise the document could not be called upon its face a contract. Therefore, in the document itself I think I get a reference to some agreement or transaction binding "I." That being so, a document is produced before me bearing the same date, in the same words, with the same alterations in the body of it, also called a contract. It is obviously the original of which this document is the duplicate. The verbal evidence in the case proves that to be so, and that they were executed and exchanged at the same time; but, apart from that evidence, I am of opinion, finding as I do a reference in the document to some other transaction which is a transaction binding on "I," that I am at liberty to inquire what that transaction was, and I find that it was a transaction evidenced in a written document which contains the purchaser's name; and, so, in my opinion, I may connect those two documents and read them together as one. So, again, I find a sufficient memorandum within the Statute of Frauds.

There is another way in which the same result may follow. This document, as I have construed it, is complete and a sufficient memorandum under the statute except in one particular—namely, that it does not contain the purchaser's name. To be a memorandum within the statute a document need not contain the purchaser's name; it is sufficient—for that, there is abundant authority—if the purchaser is sufficiently described so as to be capable of identification. Does this document sufficiently identify "I"? I think it does. Taking the document as a whole, it shows that "I" is the person who has undertaken and discharged the obligation to pay 50*l.*, and it has been proved that the person who paid the 50*l.* was Mr. Stokes; I am entitled to take that verbal evidence and so identify the person who is described as "I" as the person who has undertaken to discharge and has discharged that obligation. I am justified in doing that on the authority of *Carr* v. *Lynch*. (1) That was a case of a letter written and signed by the proposed vendor—really a case of granting an extension of a lease, but I call him the

(1) [1900] 1 Ch. 613, 615.

vendor—beginning "Dear Sir," and there was no envelope to assist us because the letter was apparently handed across a table. It was in these terms: "In consideration of you having this day paid me the sum of 50*l.* (fifty pounds) I hereby agree and undertake to grant you or your assigns a further lease of 24 years (twenty-four) 'W. L.' of the premises known as the 'Warden Arms,' 27 Warden Road, Kentish Town, London, N.W., to run immediately after the expiration of the term granted by the now existing lease dated the 24th day of June, 1885, and made between William Lynch and Charles Smith of the premises. Such new lease to be subject to the same rental, 50*l.* (fifty pounds), and to contain similar covenants and conditions as are contained in the now existing lease. (Signed) William Lynch." Then there followed these words: "Witness; Arthur Frederick Keeves Jayne." Jayne was the proposed purchaser or lessee. Two or three points arose; one, whether the proposed lessee or purchaser was named. It was argued that the document was sufficient because the memorandum mentioned the purchaser, and on that Farwell J. decided the case. He said: "I should be sorry if I had to allow the defendant's plea of the Statute of Frauds to prevail in this case. According to the rule as stated in *Potter* v. *Duffield* (1), the statute is satisfied if the parties are sufficiently described, so that their identity cannot be fairly disputed. In this case it is plain on the memorandum that the lease is to be granted to the person who paid the 50*l.* This is quite as good a description as the word 'proprietor,' which was held sufficient in *Sale* v. *Lambert* (2), and it is admitted in the defence that that person was Jayne. If further authority is wanted, there is the recent case of *Plant* v. *Bourne*. (3) Id certum est quod certum reddi potest." I think, following that, and applying it to the case before me, I am at liberty to ascertain the identity of "I" by seeing who it is who fills the description of "I" in this document—namely, as being the person who has undertaken to discharge

(1) (1874) L. R. 18 Eq. 4. (2) Ibid 1.
(3) [1897] 2 Ch. 281.

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and has discharged the obligation to pay 50*l*. The case is interesting, too, upon another aspect of the case before me. I have decided upon the construction of the document that the signature of the vendor was his signature as a party to be bound. In *Carr* v. *Lynch* (1) the document was signed by the purchaser Jayne, although not in the capacity of purchaser; he was described as a witness, and the report states: "The plaintiff was prepared if necessary to call evidence to prove that Jayne intended to sign as a party to be bound, and that the word 'witness' was left in by mistake, the memorandum having been drawn on the assumption that a witness was necessary. The defendant admitted the receipt of the 50*l*."; and Farwell J., in his judgment, says: "The alleged mistake as to the word 'witness' might also have been relied on if it had been necessary to hear the evidence." So, apparently, Farwell J. was prepared, if necessary, to hear evidence explaining how it was that Arthur Frederick Keeves Jayne came to be a witness, and to show that that was a mistake: he had not really signed as witness but had signed as a party intending to be bound.

Upon all these grounds, I think the defendant fails, and there must be a decree for specific performance.

Solicitors: *J. D. Arthur, for King & Franckeiss, Portsmouth; Mills & Morley, for J. R. C. Miller, Southsea.*

A. L.

(1) [1900] 1 Ch. 613, 614.

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[1918. R. 647.]

Administration—Account—Executor—Action by Beneficiary—Share of Residue —Action to recover Legacy—Lapse of Time—Real Property Limitation Act, 1874 (37 & 38 *Vict. c.* 57), *s.* 8—*Trustee Act*, 1888 (51 & 52 *Vict. c.* 59), *s.* 8, *sub-s.* 1 (*a*) *and* (*b*).

The real and personal estate of a testator who died in 1909 was administered by his widow and the defendant as executors of his will, and their functions came to an end in 1910. Under the will the widow was absolutely entitled to the whole of the residuary estate. No formal accounts were delivered to the widow by the defendant, who was a solicitor, but he informed her of all that was done, and about the end of 1910 prepared and gave to her a book containing all the particulars of her property. She died in 1917, and in 1918 beneficiaries under her will, of which the defendant was also executor, brought an action against him for the administration of the original testator's estate and for an account of his dealings therewith, but did not allege that any part of the estate had been misapplied. The defendant relied upon s. 8 of the Trustee Act, 1888, as a defence to the action:—

Held, affirming the decision of Peterson J. on this point, that the action was one to recover a legacy within s. 8 of the Real Property Limitation Act, 1874, and as there was thus an existing statute of limitation applicable, s. 8, sub-s. 1 (*b*), of the Trustee Act, 1888, did not apply, and the period of twelve years limited by the Act of 1874 not having expired when the action was brought that Act was no defence to the action.

Peterson J. had held however that s. 8, sub-s. 1 (*a*), of the Act of 1888 applied to an action against an executor for an account, and that the claim was barred by the lapse of six years as to all items in the account not falling within any of the exceptions in s. 8, sub-s. 1; but, nevertheless, following the dictum of Cozens-Hardy M.R. in *In re Blow* [1914] 1 Ch. 233, 243, he had directed the usual accounts against the defendant as executor in order to ascertain the facts.

Held, by the Court of Appeal, that the Trustee Act, 1888, did not apply at all, and that the plaintiffs were entitled to an account.

Semble, however, that in taking the account the defendant would not be precluded from setting up any available defence with regard to particular items.

Dictum of Cozens-Hardy M.R. observed upon.

In re Croyden (1911) 55 Sol. J. 632 discussed and not followed.

An action by a residuary legatee against an executor for the administration of the testator's estate is none the less an action to recover a legacy within s. 8 of the Real Property Limitation Act, 1874, by reason

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of there being no allegation by the plaintiff that the defendant had, at the date of action brought, assets of the testator in his hands. *Kohler* v. *Reynolds* (1857) 26 L. J. (Ch.) 415 explained.

APPEAL from a decision of Peterson J. (1)

By an originating summons Joanna Pole, widow, and Alexander Charles Reginald Pole asked for the administration of the personal estate of Charles Garner Richardson, the claim to have the real estate also administered having been abandoned.

Charles Garner Richardson died on July 30, 1909, having by his will dated August 11, 1908, appointed his wife, Caroline Seaborne Richardson, and the defendant, Charles Robert Edwin Pattenden, executors thereof, and after making divers pecuniary bequests the testator devised and bequeathed the residue of his estate, both real and personal, to his wife absolutely. Both executors proved the will. The testator left considerable real and personal estate of which the executors possessed themselves.

Mrs. Richardson died on January 22, 1917, having by her will, dated May 3, 1915, appointed the plaintiff, Joanna Pole, and the defendant, executors and trustees thereof, and after giving beneficial interests to both the plaintiffs, she devised and bequeathed her residuary real and personal estate to the second plaintiff, A. C. R. Pole, absolutely.

The defendant was a solicitor and, according to the evidence, Mrs. Richardson, who was a very old lady, left to him the active management of the administration of the estate of C. G. Richardson. The testator's debts and the legacies given by his will were duly provided for, and the functions of the executors as such came to an end in 1910. After the death of Mrs. Richardson it appeared that certain stocks and shares which formed part of the testator's estate, to which Mrs. Richardson was absolutely entitled as residuary legatee, remained standing in the joint names of the defendant and herself, but, on the evidence, this was at her request in her lifetime as she desired to save the cost of stamps on transfers. These securities were thus held by the two not

(1) [1919] 2 Ch. 50.

as executors but as trustees for Mrs. Richardson. No accounts were rendered by the defendant to Mrs. Richardson, but he stated in his affidavit that he did nothing in the administration without her concurrence, and that in or about the year 1910 he prepared a book in which were inserted particulars of the whole of Mrs. Richardson's estate, whether derived from the testator or from other sources, and handed her a copy thereof. The defendant also alleged that since the winding up of the estate in 1910 he had not had in his hands any amounts forming part of the testator's estate. The plaintiffs did not suggest any misconduct on the part of the defendant, but on August 27, 1918, they issued their summons for the purpose of ascertaining of what the testator's estate consisted.

The defendant contended that the plaintiff's claim was barred by s. 8 of the Trustee Act, 1888. (1)

Peterson J. held that the action was one to recover a legacy within s. 8. of the Real Property Limitation Act, 1874, and as there was thus an existing statute of limitations applicable, s. 8, sub-s. 1 (*b*), of the Trustee Act, 1888, did not apply, and was no defence. But he held further that

(1) Trustee Act, 1888 (51 & 52 Vict., c. 59), s. 8, sub-s. 1: "In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof, still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply:—

(*a*) All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him;

(*b*) If the action or other proceeding is brought to recover money or other property, and is one to which no existing statute of limitations applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received. . . . ."

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s. 8, sub-s. 1 (*a*), applied to an action against an executor for an account, and that the claim was therefore barred by the lapse of six years as to all items in the account which did not fall within any of the exceptions in s. 8, sub-s. 1.

Following what was said by Cozens-Hardy M.R. in *In re Blow* (1) he directed that the usual accounts should be taken against the defendant as executor in order to ascertain whether the case fell within the exceptions in s. 8, sub-s. 1.

The defendant appealed and there was a cross-appeal by the plaintiff against the holding of Peterson J. with reference to the application of s. 8, sub-s. 1 (*a*).

Hughes K.C. and *F. E. Farrer* for the appellant. The conclusion of Peterson J. is inconsistent with the first part of his judgment. He held that an action for an account was barred by s. 8, sub-s. 1 (*a*), and yet he directed a general administration in order to ascertain whether the appellant was within the exceptions in s. 8, sub-s. 1. The appellant is protected by the Trustee Act, 1888, from having to render accounts after the lapse of six years. If the plaintiffs have reason to suppose that the defendant has converted to his use any part of the testator's estate their remedy is to bring an action in which they could obtain discovery. Under the Act of 1888 a trustee or executor is placed in the same position as if he were not a trustee. If the judgment appealed against is right the protection of the Act is to a large extent taken away.

The matter was discussed in *How* v. *Earl Winterton* (2) which was applied in *In re Blow*. (3)

[LORD STERNDALE M.R. If this proceeding is an action for account and an action for account is barred after six years, I do not see how an account can be directed as was done by Cozens-Hardy M.R. in *In re Blow*. (1)]

[WARRINGTON L.J. referred to *Foley* v. *Hill*. (4)]

In *Knox* v. *Gye* (5) Lord Westbury said: "That a Court of

(1) [1914] 1 Ch. 233, 243.
(2) [1896] 2 Ch. 626.
(3) [1914] 1 Ch. 233.
(4) (1844) 1 Ph. 399.
(5) (1872) L. R. 5 H. L. 656, 673.

Equity will not, after the lapse of six years without acknowledgment, decree an account between a surviving partner and the estate of a deceased partner has been long settled by various decisions."

The position here is that the sole beneficiary and co-executrix with the defendant was for six years after the estate had been wound up perfectly satisfied with what had been done by the defendant. On her death no new right accrued to her personal representatives. The relationship of solicitor and client which existed between the defendant and the beneficiary is immaterial for the present purpose. If a beneficiary stands by for six years after the winding up of the estate and does nothing he is not entitled to require an account from the executor.

In *Lockey* v. *Lockey* (1) before Lord Macclesfield, which was referred to in *Knox* v. *Gye* (2), it was held that where a Court of equity assumes a concurrent jurisdiction with Courts of law no account will be given after the legal limit of six years if the statute is pleaded. As to the difference between a suit in Chancery for an account and an action for an account at common law, in *In re Page* (3), it was unsuccessfully argued that the Trustee Act, 1888, was not intended to relieve trustees from the necessity of accounting to their cestuis que trust, and could only be used as a bar to an application for payment. It was there held that the plaintiff, an infant, was not entitled to an account after the expiration of twelve years from his attaining twenty-one.

In re Croyden (4) is very much in point. There a legal personal representative handed over the assets to the wrong persons more than six years before the commencement of proceedings by the person entitled to recover the same and it was held that the claim was barred.

That case was referred to in *In re Blow*. (5)

On the evidence it is clear that there were no assets in the

(1) (1719) Prec. Ch. 518.
(2) L. R. 5 H. L. 656, 674.
(3) [1893] 1 Ch. 304.
(4) 55 Sol. J. 632.
(5) [1914] 1 Ch. 233.

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defendants' hands during the last six years, the whole estate having been wound up in 1910.

If the plaintiffs contend that the case comes within one or other of the exceptions to the Trustee Act, 1888, they must allege and prove it. That is necessary before they can get a judgment for an account.

As to the dictum of Cozens-Hardy M.R. in *In re Blow* (1) his Lordship in effect rewrites all statutes of limitation. He reads s. 8 of the Trustee Act, 1888, "in any action, etc." as "in taking the accounts adjudged in any action," and the words "except where the claim is founded upon, etc." as "except where the defendant proves that the case is not one of, etc."

As the action comes before this Court, it is not one to recover a legacy, but in truth a bill of discovery to have the accounts taken in order to see whether there is in fact a legacy or not. The first thing in an action to recover a legacy is to assert and prove its existence: a legacy is not constituted by written words merely but by assets to meet it.

The plaintiff does not assert that there is anything to come to him; his action therefore is demurrable; but the appellant does not stand on that only, he swears that the estate was fully administered six years ago and that since then he has had no assets in his hands.

Being then an action for account, it is barred after six years by analogy to the statute of James I.; alternatively by s. 8 (*a*) of the Act of 1888: *Kohler* v. *Reynolds* (2); *Knox* v. *Gye*. (3) In *Kohler* v. *Reynolds* (2), Wood V.-C. held in effect, (1.) that an action for an account by next of kin, not alleging anything in the hands of the administrator would be barred by the lapse of six years; and (2.) that as to a fund admitted to be in the administrator's hands no time ran. The right to a residue differs from the interest of the next of kin in an intestacy only in this, that in the first case the testator makes his own will, and in the second the law makes it for him. The Law of Property Amendment Act, 1860, was

(1) [1914] 1 Ch. 233. (2) 26 L. J. (Ch.) 415.
(3) L. R. 5 H. L. 656, 674.

passed to meet the second point only in *Kohler* v. *Reynolds* (1), and in reality to supply the omission in s. 40 of the Act of 1833, which applies only to a legacy; the Act of 1860 does not affect the first point.

In every case in which it has been held that an administration action by a residuary legatee was an action to recover a legacy, it was either proved or admitted that there was in the executor's hands, either actually or as having been converted to his own use, a fund which, if the executor's defence upon the statute failed, would be immediately recovered by the plaintiff as his residue. The action in such cases was consequently one to recover a legacy: *Christian* v. *Devereux* (2); *Adams* v. *Barry* (3); *Prior* v. *Horniblow* (4); *In re Davis* (5); *In re Barker* (6); *In re Lacy* (7); *In re Rowe.* (8)

Here the plaintiff has obtained and could only obtain the ordinary full administration decree involving accounts of the funeral and testamentary expenses, debts, etc. If on taking the accounts a balance is found in the defendant's hands the action might thereupon become one to recover a legacy, but it is not so yet; nor does the plaintiff assert that there will be such a balance.

While, as during the time of the Commonwealth, when the spiritual courts were shut, a direct action lay at law for a legacy, regardless of any express promise of the executor to pay, the plaintiff had to allege and prove assets: *Nicholson* v. *Shirman* (9); *Atkins* v. *Hill* (10); so too in equity a legatee could sue, but had to prove assets. In default he got an account of legacies with rateable payment: Mitford on Pleading, p. 194. The passage there clearly indicates by the use of the words "payment," and "rateably," that it was understood that the executor had in his hands a fund. Mitford does not speak of a full administration decree, and he is not dealing with time running against the account of

(1) 26 L. J. (Ch.) 415.
(2) (1841) 12 Sim. 264.
(3) (1845) 2 Coll. 285.
(4) (1836) 2 Y. & C. Ex. 200.
(5) [1891] 3 Ch. 119.
(6) [1892] 2 Ch. 491.
(7) [1899] 2 Ch. 149, 158.
(8) (1889) 61 L. T. 581.
(9) (1661) 1 Sid. 45.
(10) (1775) 1 Cowp. 284, 288.

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legacies. If in this case the Court directs an account and nothing should be found due, how can the proceeding be an action to recover a legacy? Before the Act of 1833 there was no statute of limitations as to the recovery of a legacy, because the very nature of the action imported that there must be a fund in the executor's hands to answer it, consequently, as the Courts held, a trust fund. But for that very reason after lapse of time payment might be presumed: Roper on Legacies, 4th ed., p. 926. Payment is not presumed unless there has been a fund whereout to pay.

The judgment of Peterson J. has placed the onus upon the defendant instead of upon the plaintiff, and it cannot be supported.

[They referred also to *Deeks* v. *Strutt* (1); *Jones* v. *Tanner* (2); and *In re Mackay.* (3)]

Tomlin K.C. and *A. Adams* for the respondents (appellants on the cross-appeal). The Trustee Act, 1888, s. 8, relates (1.) to cases to which no statute in 1888 applied, and (2.) to such cases as the present where an existing statute did apply. The Act has no application to this case.

This is an action to administer by a person who is interested in the estate. There is no difference in the character of the action by reason of the complication of the parties. The case must be treated as if it were brought by a sole legatee, who was not an executor, against a sole executor. That must be an action to recover a legacy. It has always been so treated in the common law Courts: *Deeks* v. *Strutt.* (1)

A suit in equity to recover a legacy necessarily involved the administration of the estate. The effect of administration was to create in the personal representative a liability to pay. In equity he either admitted assets and made himself liable, or he did not, in which case administration was granted.

Until the Judicature Act and Rules a beneficiary had an absolute right to a decree for administration. That right

(1) (1794) 5 T. R. 690. (2) (1827) 7 B. & C. 542.
(3) [1906] 1 Ch. 25.

is now limited by Order LV., r. 10, which gives a discretion to the Court to make a more limited order.

[WARRINGTON L.J. referred to *In re Blake.* (1)]

On the evidence here there was a large estate. It is true that the executor claims that he has duly disposed of it. No one can tell until an account has been taken whether the estate was duly administered.

It is said that where a beneficiary commences a suit in equity he has to prove assets; in the case of a residuary legatee that means that he has to prove there is a residue. Here that fact is admitted. This is a suit in equity for administration, and a suit for administration is a suit to recover a legacy. Peterson J. has misapprehended the somewhat obscure report of *In re Croyden.* (2)

A beneficiary is never barred from requiring the executor to give an account. The right of a residuary legatee is not to a fixed sum of money but to every item of the testator's estate that remains after all the prior charges have been paid.

In re Davis (3) was an action by residuary legatees against an executor for an account, and it was held to be an action to recover a legacy within the Real Property Limitation Act, 1874, s. 8, and an account was directed limited to sums received within twelve years before the commencement of the action: see also *In re Barker.* (4)

How v. *Earl Winterton* (5) and the other cases cited were cases of express trusts and have no application to the present case.

In re Lacy (6) is a clear authority for the proposition that where the proceeding is by a legatee to recover a legacy it is not a case within the Trustee Act, 1888, but is provided for by an existing statute of limitations.

In re Timmis (7) was the case of an express trustee to which an existing statute of limitation applied within s. 8 of the Trustee Act, 1888.

(1) (1885) 29 Ch. D. 913.
(2) 55 Sol. J. 632.
(3) [1891] 3 Ch. 119, 124.
(4) [1892] 2 Ch. 491.
(5) [1896] 2 Ch. 626.
(6) [1899] 2 Ch. 149, 158.
(7) [1902] 1 Ch. 176.

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In re Mackay (1) shows that an action to recover a share of residue is an action to recover a legacy within s. 8 of the Act of 1874 and therefore is barred after twelve years.

In *In re Rowe* (2) the question was whether a declaration in a residuary account prepared for the revenue authorities amounted to a declaration of trust by the executor so as to prevent the statute of limitations from running, and it was held that it did not.

In re Johnson (3) is an example of a case falling within s. 13 of the Law of Property Amendment Act, 1860 (23 & 24 Vict. c. 38), and shows that a suit for administration is one of the suits within that statute and that a claim by a residuary legatee is a claim to every item of the testator's estate after prior charges have been paid.

In *Prior* v. *Horniblow* (4) it was held that the section applied to a share of residue.

On these authorities it is submitted that the Act of 1888, sub-s. 1 (*b*), applies only to cases where there is no existing statute of limitation applicable; that the Act of 1874 applies to the present case and therefore that the Act of 1888 has no application to it. If that is so the order of Peterson J. was wrong as to the limitation of the account and the respondent's cross-appeal ought to succeed. *In re Croyden* (5) was not a beneficiaries' action. Peterson J. has misapprehended the facts in that case. The decision cannot be relied upon.

In re Blow (6) was a creditor's action and the principles which are applicable to such a case do not apply to the present.

It is submitted therefore that the appeal fails and the cross-appeal succeeds.

Farrer in reply. This is not an action to recover a legacy, but rather in the nature of a bill to discover whether there is a legacy or not. There is no allegation that the appellant has anything in his hands. He swears that more than six

(1) [1906] 2 Ch. 25.
(2) 61 L. T. 581.
(3) (1885) 29 Ch. D. 964.
(4) 2 Y. & C. Ex. 200.
(5) 55 Sol. J. 632.
(6) [1914] 1 Ch. 233.

years ago the estate was properly administered and that during that period he has had nothing in his hands. If an account be decreed against him he must be allowed to plead the statute in respect of any devastavit.

LORD STERNDALE M.R. This appeal from Peterson J. raises an important and difficult point. Whether there is any substance in the account which is asked for I do not know and I offer no opinion about it, but the point whether the applicants are entitled to the account is certainly an important one. The facts are stated in the report in the Court below (1), and on those facts the plaintiffs have taken out an originating summons asking for administration of the real and personal estate of the testator. That, of course, would involve an account of what the estate consisted, and I assume after the taking of the account, an order to pay to the plaintiffs what might be due to them. One of the plaintiffs is entitled to a portion of the residue. The summons describes the application as being that of Joanna Pole of Church Speen Lodge, Newbury, in the county of Berks, widow, and executrix of and a legatee under the will of Caroline Seaborne Richardson and Alexander Charles Reginald Pole of Church Speen Lodge, Newbury, aforesaid, the residuary legatee of the will of the said Caroline Seaborne Richardson, and the object of the account is to obtain payment of the residue if there be found to be a residue.

The first, and in my opinion almost the only point, to be decided is whether this is or is not an action to recover a legacy within s. 8 of the Real Property Limitation Act of 1874. The answer of the defendant to the plaintiff's application is that he is protected by the Trustee Act of 1888, and from one point of view at any rate it is necessary, in order to bring himself within the Trustee Act, 1888, that he should show that there is no existing statute of limitations applying to the claim made against him. Sect. 8 of the Trustee Act, 1888, is in these terms: [His Lordship read sub-s. 1 and continued:] Now, these provisions are

(1) [1919] 2 Ch. 50.

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applicable if the defendant can bring himself within them, because it is not alleged that any of the exceptions which I have read apply in his case. These are the provisions: [His Lordship read sub-s. 1 (*a*) and continued:] I take that to mean this: If a person has committed what Rigby L.J. in *How* v. *Earl Winterton* (1) calls a breach of duty which, whether he were a trustee or not, would give rise to an action against him, and there is in existence a statute which would be in those circumstances an answer to that action, then the person against whom the action is brought shall not be debarred from that defence because he is a trustee or executor, executor being included in the word "trustee," but he shall be able, so to speak, to put off the character of trustee altogether and avail himself of the defence just as though he were not a trustee and were only an ordinary person who had committed that breach of duty. Sub-s. 1 (*b*) says: [His Lordship read the sub-section and continued:] That is the other branch, if I may call it so, of the protecting legislation. The first (*a*) is the case where there is a breach of duty which would give rise to an action whether the man were a trustee or not, and for which there is an existing statute of limitations. The second (*b*) is where there is no statute of limitations applying at all to the action when it is brought. If this be an action to recover a legacy it does not come within (*a*) and for this reason, that this action for a legacy would not lie against the defendant except as executor. It therefore is not a case which comes within (*a*). No doubt where executors have received a legacy and have admitted that they held that legacy for legatees, an action might lie against them at common law for money had and received, but that is not an action to recover a legacy generally, and such an action could only lie against the defendant because he was an executor, and, therefore, a trustee within the meaning of sub-s. (*a*).

Now, if this be an action to recover a legacy and does not come within (*a*) can it come within (*b*)? It seems to me

(1) [1896] 2 Ch. 626.

it cannot, because it is then an action to recover money or other property, but it is not an action to which no existing statute of limitations applies, because the Real Property Limitation Act of 1874 does apply, and, therefore, if this be an action to recover a legacy in my opinion the Trustee Act, 1888, does not apply at all. Peterson J. has held that it is an action to recover a legacy, upon the authority of cases which he has cited: *Adams* v. *Barry* (1); *Prior* v. *Horniblow* (2); and *Christian* v. *Devereux* (3); and I think he is right in so holding. I do not think it necessary to go through all the authorities and give reasons in detail, and but for one point taken by counsel for the appellant I do not think it could be disputed on the authority of those cases that this was an action to recover a legacy. But it is said that an action for administration, accounts and recovery of what is found due is not an action to recover a legacy unless it be alleged that the executor has in his hands assets out of which to pay the legacy. I cannot find any such qualification in any of the authorities to which we have been referred, except perhaps one with which I will deal later. On principle I cannot see why it should be necessary to make such an allegation. The action, it seems to me, is an action to recover a legacy. If it be alleged that the defendant is the executor or personal representative of the testator or of the intestate—I take it it would apply to both—if it be alleged that the defendant is executor of the testator and that the testator has devised a certain portion of his estate to the person who is claiming, then if it be necessary also to allege that there were assets of the estate, of that there is no doubt in this case. The defendant admits that the estate was solvent and that there were assets of the estate, and I cannot see that it is necessary to go further and say that the executor has, at the moment, assets out of which to satisfy the legacy. It may be necessary to prove that fact in order to recover the legacy, but it does not seem to me to be necessary, in order to constitute the action, to allege that the executor still has those assets in his

(1) 2 Coll. 285. (2) 2 Y. & C. Ex. 200.
(3) 12 Sim. 264.

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hands. We were, however, very much pressed with a case before Wood V.-C.: *Kohler* v. *Reynolds* (1), in which, on a claim being made against the last of a long series of administrators, the Vice-Chancellor held that the bill was demurrable because it did not allege that the defendant against whom the proceedings were taken had received any assets himself. In that case Kohler died in 1800 intestate. In 1813, one Mitford, the then solicitor to the Treasury, took out letters of administration, and after payment of the debts there was a considerable surplus in his hands. Mitford died in 1824, and George Maule, on the nomination of the Crown, took out administration to the intestate's estate. George Maule died in 1851, and in 1857 letters of administration were granted to the defendant, Henry Reynolds, also on the nomination of the Crown. The intestate therefore had died fifty-seven years before the judgment was given, and the defendant Reynolds had been appointed administrator about six years before. A good deal of stress has been laid upon the fact of it being six years. I believe it to have been only a coincidence, and I do not believe that Wood V.-C. in delivering the judgment he did was intending to act upon any statutory limitation of six years or anything like it. It will be seen, as I said, that the death took place fifty-seven years before the judgment, that the first administrator died thirty-three years before, the second administrator six years before, and the defendant Reynolds was then appointed, and there was no trace at all, as far as I can see, of any money having been received by anybody except the first administrator. The Vice-Chancellor decided that the bill was demurrable because there was no such allegation. I believe it to have been a decision, as was suggested by counsel for the respondents, upon the doctrine of stale claims and laches, and I am confirmed in that by finding that the Vice-Chancellor in his judgment referred to the case of *Pickering* v. *Lord Stamford* (2) as supporting his decision, which case depended entirely upon the doctrine of stale claims and laches. That I believe to be the explanation

(1) 26 L. J. (Ch.) 415. (2) (1793) 2 Ves. Jun. 272, 581.

of *Kohler* v. *Reynolds* (1), and therefore, it is not in my opinion a decision displacing the authorities which show that this is an action for recovery of a legacy. That being so, in my opinion the Trustee Act, 1888, does not apply, and the Real Property Limitation Act of 1874 does apply, and the proceedings being taken within twelve years, the period limited by that statute, the plaintiffs are entitled to succeed, subject to this. It has been said that *In re Croyden* (2) shows that although there may be an existing statute applicable to the case, still it may come within s. 8 of the Trustee Act, 1888. *In re Croyden* (2) is not easy to understand, but I think there is only one difficulty about it, and that is this, that I am inclined to think the learned judge had overlooked the Law of Property Amendment Act, 1860. I may say that up to this point I agree entirely with the judgment given by Peterson J. Now, in *In re Croyden* (2), the facts were complicated. Those with which alone I need deal are the facts so far as they concern the proceedings taken against the executors of one Roberts, who was one of the executors of the testator, Edward Croyden. Edward Croyden had died intestate as to a moiety of his residuary estate. Roberts being, as I said, one of his executors, unfortunately distributed the moiety as to which there was an intestacy improperly, not in any way dishonestly, but improperly; he had not given it to the right persons, and proceedings were taken against him, or rather against his executors after his death, for administration of the estate of the original testator, as to which a limited administration had been granted before, in order to make Roberts' estate liable for the portion of the testator's estate which had been paid to the wrong persons. Eve J. rightly treated those proceedings against the executor as if they had been proceedings against Roberts himself, because if Roberts was not liable of course his executors could not be made liable in respect of this claim to administration of the testator's estate, and Eve J. held that if Roberts had been alive he would not have been so liable, because s. 8 of the Trustee Act, 1888, would have

(1) 26 L. J. (Ch.) 415. (2) 55 Sol. J. 632.

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been a bar. As Peterson J. says, Eve J. does not mention the statute of 1860, which provides by s. 13 "that after the 31st of December, 1860, no suit or other proceeding shall be brought to recover the personal estate, or any share of the personal estate, of any person dying intestate, possessed by the legal personal representative of such intestate, but within twenty years next after a present right to receive the same shall have accrued."

This was a proceeding, taking it as a proceeding against Roberts, against the personal representative of an intestate to recover a portion of the testator's estate as to which he was intestate and, therefore, with respect to Eve J., I think he was wrong in treating it as though there were no existing statute of limitations. There was an existing statute of limitations, and on that point I cannot agree with Eve J., and I think that Peterson J. perhaps assumed rather too much when he said that "The report of *In re Croyden* (1) does not indicate whether the learned judge decided within which of the two sub-clauses (*a*) and (*b*) the case came; but the Act of 23 & 24 Vict. c. 38 can hardly have escaped his attention." I cannot help thinking myself that if that statute had been present to Eve J.'s mind he would not have held that the Trustee Act, 1888, applied; therefore, I do not think that *In re Croyden* (1) is in any way an authority against the conclusion to which I have come, that this being an action to recover a legacy is not within the Trustee Act, 1888, at all and that the only statute of limitations which applies to it is the Real Property Limitation Act, 1874, which does not protect the defendant because the time under that Act has not yet expired. I only wish to add this. Peterson J. ordered an account although he held on the authority of *In re Croyden* (1)—as I do not think he should have held—that s. 8, sub-s. 1 (*a*), of the Trustee Act, 1888, applied; and he ordered it on the strength of the dictum of Lord Cozens-Hardy when Master of the Rolls in *In re Blow* (2) that although the statute might apply to bar an action of account it might be well sometimes to direct

(1) 55 Sol. J. 632. (2) [1914] 1 Ch. 233.

an account in order to see whether the defendant did or did not come within the exceptions in the early part of s. 8. It is not necessary for me to say anything about that, and I do not say more than this, that I have the greatest possible difficulty in seeing how, if an action for an account be barred by the statute, the Court can in its discretion direct an account. It is not necessary, however, for me to come to any decision upon that point. The result of my conclusion is that the appeal must be dismissed. I agree with the decision of Peterson J. ordering the account, but not entirely upon the same ground, and I think I ought to add that this, of course, is without prejudice to any defence which the defendant may be able to set up with regard to any particular item of the account when it is taken. It may be that there are statutes which will prevent the plaintiffs from recovering from the defendant certain items in the account, and what I have said in coming to the conclusion that the plaintiffs are entitled to have an account does not in any way interfere with his rights or his defences whatever they may be with regard to any particular items. The result is that the appeal will be dismissed and the cross-appeal allowed with costs in each case.

WARRINGTON L.J. This is an appeal from a judgment of Peterson J. by which he has directed an account in an administration action limited to six years before the issue of the originating summons. Except that he has allowed an account for an earlier period for a particular purpose referred to by the Master of the Rolls, the substance of what he has held is this: That the Trustee Act of 1888 applies so as to bring in the period of six years as the period of limitation. It is contended on behalf of the respondents, who have a cross-appeal, that the real period of limitation which ought to be applied, if it were applicable, would be the twelve years fixed by the Real Property Limitation Act of 1874 (37 & 38 Vict. c. 57).

The action is brought by the representatives of the residuary legatee of a testator against a surviving executor for the

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administration of the estate of the testator. The facts proved by affidavit are that on the death of the testator the defendant, whose co-executor was also residuary legatee, administered and got in the estate, and that there was an estate of considerable value, after payment of debts and legacies, which was said to have been handed over to the residuary legatee. The defendant said that within the period of six years before the issue of the originating summons he received no items of the testator's estate. The statute of 1874, reading it very shortly and only so far as it is material to the present case, provides that " No action or suit or other proceeding "—and it is noticeable that the word " suit " is used there, because the Act was passed in the year 1874 at the time when the old Court of Chancery was still in existence and there was a distinction between an action at law and a suit in equity : the statute, therefore, plainly applies to a suit in equity as well as to an action at law : " No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same "—and then there are certain savings which I need not mention. If, therefore, the present action is an action or suit to recover a legacy, the statute of 1874 clearly applies to it and Peterson J. in the first part of his judgment has so held. In my judgment, the real question we have to determine is whether in a case where you are dealing with a suit to which there is an existing statute of limitations applicable, and to the application of which there is no objection on the ground that the defendant is a trustee, it is necessary to resort, or proper to resort, to the Trustee Act of 1888 at all. The Trustee Act of 1888 was, it is well known, passed in order to remove what was thought to be a hardship on innocent trustees, that whatever might be the length of time that had elapsed since the commission of an alleged innocent breach of trust, the trustee

was unable to rely upon the Statute of Limitations. Two things seem to me to be perfectly clear upon that statute. The section in question (s. 8), which removes the disability from trustees, and gives them the right to plead the lapse of time in certain cases, is divided into two parts. The first part, which is sub-s. (*a*) of sub-s. 1, is to the effect that a trustee shall enjoy all the rights and privileges conferred by any statute of limitations in like manner as he would have enjoyed them if he had not been a trustee; that is to say, that where there is brought against a trustee an action which, if he had not been a trustee, would have been barred by any statute of limitations, then the mere fact that he is a trustee shall not deprive him of the benefit of the statute. A very good example of a case such as was contemplated by this sub-s. (*a*) is, I think, the famous case of *Burdick* v. *Garrick* (1), where there was an action for an account brought against an agent. It happened that unfortunately the agency was such that the Court held that it constituted him not merely an agent liable to account as such, but a trustee, and he was, in consequence, not allowed to plead the statute of limitations, which would have been applicable to him if he had been a mere agent. That is a very good example of a grievance which was intended to be remedied by that sub-section. The second sub-section deals with a different set of questions. It deals with cases in which there is a claim against a trustee arising directly out of the relation of trustee and cestui que trust, and to which no existing statute of limitations applies, and is applicable only to an action or other proceeding to recover money or other property. If no statute of limitations applies, then the Trustee Act, 1888, fixes by analogy the protection that may be enjoyed, and the period of six years is the period of limitation.

I now proceed to consider what is the nature of the action in question, in order to ascertain whether it is or is not an action to which any existing statute of limitations applies. The action, as I have said, is one brought by a residuary

(1) (1870) L. R. 5 Ch. 233.

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legatee against the legal personal representative of the testator for the administration of the testator's estate. An action of such a nature as that is intended to result, and does result, if the facts as ultimately ascertained justify it, in some form of order by which the plaintiff recovers his legacy, that is the residue, in such a case as the present, of the testator's estate. If there remains no such residue to be recovered, such an action, on the authority of *In re Davis* (1) and numerous other cases which were cited to us, is still an action for the recovery of a legacy. That that is so I think there can be no doubt. It is said by counsel for the appellant that that is not the true view, and that unless it is alleged that the defendant has in his hands the residue of the testator's estate which he has not accounted for, then the action for administration is a mere bill for discovery; it is not an action to recover a legacy, but an action to ascertain whether or not there is a legacy. Now, I never heard of any case, and none has been cited, which is an instance of a demurrer in the old days for want of equity to a bill brought for administration on the ground that the plaintiff failed to allege that the executor actually had in his hand at the moment assets representing the residuary estate of the testator. The only authority referred to in support of the contention that this must be treated not as an action for the recovery of a legacy but as a mere action for an account is *Kohler* v. *Reynolds*. (2) I think that case is capable of a plain explanation. It was a very remarkable case of stale demand. It was an action brought by representatives of the alleged next of kin of a man who died in the year 1800 intestate. It was brought in the year 1857, that is fifty-seven years after the death of the intestate, apparently because no next of kin had come forward to claim any interest in the estate. The solicitor to the Treasury had taken out letters of administration, and it was alleged in the bill that there remained a considerable surplus in his hands. That was some time prior to 1824. Mr. Mitford died in 1824, and his administration, therefore, ceased

(1) [1891] 3 Ch. 119. (2) 26 L. J. (Ch.) 415, 416.

altogether at that date. In that year, that is twenty-eight years before the commence ent of the suit, a Mr. Maule had been nominated by the Crown and had taken out letters of administration. He had died in 1851, and on his death letters of administration had been granted to the defendant Reynolds. The bill did not allege that either Maule or Reynolds had received any part of the intestate's estate. Reynolds demurred to the bill. The Attorney-General was made a defendant; I do not quite know why, because he did not represent the two administrators; he only represented the Crown, who I suppose was regarded and treated for the purpose of this suit as a beneficiary; but it does not matter; Reynolds, and I assume the Attorney-General also, demurred to the bill. The judgment of Wood V.-C., which was relied on by counsel, was this: After referring to the facts and the statements in the bill the learned Vice-Chancellor said: "It does not aver that anything has come to their hands" —that is to the hands of Maule and Reynolds—"and in the absence of such averment, the question arises whether it is to be assumed that there was something. If I made that assumption, I must further assume that it was paid away." Then come these words: "If a person administering in 1851 to a man who died in 1800, paid away all the fund, and there was no claim till 1857, I apprehend it is too late to question that payment. It seems to me that as to any account, the rule laid down in *Pickering* v. *Lord Stamford* (1) is perfectly consistent with the principle of the Statute of Limitations, and the doctrine of laches in this Court."

Now, it is said that Wood V.-C. there laid down that in a case where there is no averment such as that which he is referring to, if the claim is to be treated as if it were a common law claim for an account, the six years limit imposed or created by the statute of James I. is to apply to that claim. In my opinion the learned Vice-Chancellor is saying nothing of the kind. It is almost inconceivable if he intended to hold that in such a case the Statute of Limitations would be applicable, that he should not have stated the

(1) 2 Ves. Jun. 280.

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exact date of the administration in 1851 and the exact date at which the suit was brought. It seems to me that the fact that the period elapsing happened to be from some uncertain date in 1851 to some uncertain date in 1857—that is roughly, but only roughly, six years—is a mere coincidence, and that he was referring generally to the lapse of time and not to any period fixed by any statute of limitations is I think made plain by his reference to *Pickering* v. *Lord Stamford*. (1) The Master of the Rolls (Sir Richard Pepper Arden) refers to the case of *Jones* v. *Turberville* (2) which, he says, "is a very clear case, in which the Lords Commissioners in last Michaelmas Term" (1793) "held a legacy barred after forty years and would not entertain the bill. If this had been the case of a legacy, I should have been of opinion that there was a bar on the presumption of satisfaction." That is to say, in the case of a stale demand of a legacy, where there was no statute of limitations, the Court would have come to the conclusion that the claim was too late and was barred by mere lapse of time. I believe that is the explanation of *Kohler* v. *Reynolds* (3), and it really has no bearing upon the present case. In my opinion this is an action for the recovery of a legacy.

Now, if it be an action to recover a legacy, has the Trustee Act, 1888, anything to do with it at all? In my opinion it has not. Sub-s. (*a*) of sub-s. 1 has nothing to do with it because the executor was never precluded by the fact that he was executor, which is the only thing that is material, from getting the rights and privileges conferred by the Act of 1874. The Act of 1874 was passed for the express purpose of giving the executor those rights and privileges. Sub-s. (*a*), therefore, of the Act of 1888 has nothing to do with it. Then has sub-s. (*b*) anything to do with it? I think clearly not, because if I am right that this is an action for the recovery of a legacy then there is an existing statute of limitations which applies. But Peterson J. though he came to the conclusion that this was an action for a legacy thought it

(1) 2 Ves. Jun. 280. (2) (1792) 2 Ves. Jun. 11.
(3) 26 L. J. (Ch.) 415.

might also be treated as an action for an account to which there was no existing statute applicable, or rather as an action for an account in which the trustee as such would not be able to plead the statute of limitations, and that the disability was removed by sub-s. (*a*). With all respect to the learned judge I fail to follow how that can be. It comes to this, that you may treat the same action for one purpose as an action for a legacy and barred by twelve years, and you may take that same action and say that in one aspect of it it is an action for an account and it is barred by six years; that is to say, the same action is to be barred or not according as you adopt one or other view of what it is and say that it is in one or other of those two classes but not in both. It seems to me that is a perfectly impossible position. Now, in support of that conclusion Peterson J. refers to and relies on *In re Croyden* (1), a case before Eve J. I confess it is somewhat difficult to understand. But this much is quite clear, that Edward Croyden died intestate in 1891 as to a moiety of his residue. He had two executors, one of them being a man named Roberts who was dead at the date of the institution of the suit, and the suit in question was instituted against the representative of the last surviving executor of Roberts, and certain other persons who were entitled to interests in the testator's estate. A decree was made for the administration of the estate of the original testator. That seems to me to have been a correct decree, and it was made against the remaining executor or representative of the deceased executor. It was quite correct because the case was covered by the Law of Property Amendment Act, 1860, which fixed a period of twenty years in a case of a claim to the personal estate of an intestate whether it was a partial intestacy or a complete intestacy. Therefore, there was no answer to the plaintiff's claim treated as a claim to the personal estate of the testator Edward Croyden. Then, in the course of working out that decree in order to obtain the actual relief against the representative of Roberts it was necessary to administer

(1) 55 Sol. J. 632.

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Roberts' estate. It was the claim to administer Roberts' estate with which Eve J. dealt, and he treated the claim against Roberts' estate as a mere claim to enforce a personal liability of Roberts for a devastavit or debt, and applied to it s. 8, sub-s. 1 (*a*), of the Trustee Act of 1888 as if there had been no statute of limitations available. Well, now, in my opinion, with all respect to Eve J., I think he did inadvertently omit to consider the effect of the Law of Property Amendment Act, 1860, and I think if he had considered that statute he would have come to the conclusion that that was a statute which applied as much to the case of the claim against Roberts as it did to the claim against the surviving executor, and if he had so held then I think he would probably have held that the period fixed by the statute being twenty years, and that twenty years not having elapsed, he could have made the order which was asked for against the estate of Roberts which he refused on the ground that he thought there was no existing statute which applied, and that, therefore, the Trustee Act of 1888 did apply.

The result of my view is that this claim is to recover a legacy, and that the period fixed by the statute of 1874 is therefore the correct period and that the executor is not debarred—there is no express trust—from pleading that period. Therefore, the Trustee Act of 1888 is not required and does not apply and the learned judge ought to have made the ordinary decree for administration of the testator's estate.

With reference to what has fallen from the Master of the Rolls as to the operation or the nature of that decree, I think it is plain that the mere fact that a decree for administration is pronounced which includes an account does not preclude the defendant from setting up a defence as to any particular item of that account which he may in fact have. It is difficult to see how he can plead any statute of limitations, but I will say nothing about that. He may have a defence to a particular item. If he has, nothing that I have said will preclude him from raising that defence, but I do not think it would be in accordance with the practice in such a

case as this, where we find that the claim is not barred by the statute, to insert any special words reserving any special defence which the defendant has. I think the plaintiff is entitled to have an account with such result as that will entail.

Then with regard to the other point I must not be taken as at present assenting to the view that where a claim for an account is actually barred by the statute, the Court would be justified in directing an account for the purpose of ascertaining some facts the result of which might be to displace the period of limitation altogether. If the statute of limitations applies, that bars the claim for the account. I do not desire to say anything further on that point. The result is that in my opinion the decree for administration ought to be made in the ordinary form.

YOUNGER L.J. I am of the same opinion and desire to add only a very few words. In form, this action is somewhat exceptional. It is treated on both sides as being in substance an action by a residuary legatee against the surviving executor of her testator to have the personal estate of that testator administered by the Court, and it is, I think, clear that in substance and in fact that action is within the meaning of s. 8 of the Act of 1874 an action to recover a legacy. It is the only means by which a person in the position of residuary legatee can recover the amount of his residuary interest against an executor who, he says, has not accounted to him fully for it.

The testator has been dead, I think, about eleven years, and accordingly the limitation prescribed by the statute of 1874 has not expired. Prima facie, therefore, one would have thought that it being admitted that the testator died possessed of substantial assets, the decree, in the absence of special circumstances, which do not in this case exist, would have been almost a matter of course. It is however objected in the first instance, and the objection is a formidable one if it is well founded, that in the case of an action for the administration of an estate of a dead testator more than six

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years before the date of the originating summons, a decree for administration will not be made, treating that action as an action for the recovery of a legacy, unless the plaintiff alleges and proves, if he be put to proof by the defendant, that there are in the hands of the defendant at the date of the issue of the summons funds available to meet in whole or in part the claim of the plaintiff. The proposition sounds rather startling and no authority has I think been cited in support of it, so far as a suit in equity is concerned, except the case before Wood V.-C. which my Lord and Warrington L.J. have already referred to. For the reasons stated by them I agree in thinking it is not an authority for the proposition. I desire to add this further reason why it appears to me that the proposition is not well founded. If well founded it amounts to this, that while upon an executor there is undoubted liability to account, in the case of a claim made within the statutory period, the result, if the contention is well founded, would be to throw upon the plaintiff the burden of impeaching the correctness of an executor's accounts which ex concessis he might never have seen. In other words, the existence or the non-existence of assets at the date when the summons was taken out or the writ was issued depends entirely upon the correctness of the actions of the accountable executor in relation to the estate, and it appears to me that it would be contrary to principle that in the case of a person so liable to account and with reference to whom no relevant statute has run, the plaintiff should have placed upon him the burden of establishing affirmatively the existence of assets before he had even seen the accounts. One knows that an analogous suggestion has been made in connecton with another process of administration not very different from that with which we are dealing. In the case of a petition to wind up an insolvent company it is no necessarily sufficient answer to the petition of a creditor to say that there are no assets. The reason why that has, as I understand it, always been the rule is, that you may require the machinery of the winding up for the very purpose of

ascertaining whether there ought not to be assets available to meet the petitioner's debt. Accordingly, it seems to me that the contention put forward by counsel for the appellant is not in fact well founded, nor can I find, nor have I heard, of any authority in support of it, nor can I think it established in point of principle.

That difficulty out of the way, the sole question that remains is, Is the claim barred by the Trustee Act of 1888? And for the reasons that have been given by my Lord and Warrington L.J., I am of opinion that it is not barred by that statute, and that in point of fact, having regard to the existing statute of 1874 which excludes the operation of s. 8, sub-s. 1 (*b*), of the Trustee Act, 1888, that statute does not touch it.

I wish to make one further observation only. Peterson J., feeling himself bound by authority to hold that the statute of 1888 did apply to this case, nevertheless, following some observations of Cozens-Hardy M.R., in *In re Blow* (1), did order a modified form of account directed towards ascertaining the true position of the estate. I desire, if I may be allowed to do so, to reserve any opinion of my own upon whether that form of order or any substituted form of order would be permissible on the hypothesis upon which Peterson J. proceeded. I think that it is a very serious question whether in a case like this, if the defendant were in a position to bring himself within sub-s. 1 (*a*) of s. 8 of the Act of 1888, it is possible for him to say that he is under no kind of liability at all, and for this reason: s. 8, while it does supply the trustee with a statutory defence, supplies a defence of a very limited character. It gives no protection in case of fraud or where trust property is retained by the trustee or has been converted to his use, and I think it would be a matter of very serious consequence, if a trustee merely by being able to say that he is not liable to give any account, may also be in a position to assert after a lapse of six years that he is not bound to give any kind of information. If that be the law it may very well be that the limited

(1) [1914] 1 Ch. 233.

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protection given by the statute would in substance result in, and in fact become, a complete protection to the trustee from claims which under the statute are expressly left untouched.

Accordingly, I think that that is a matter which may require very careful consideration when and if it arises, and I therefore desire to reserve my opinion upon it.

Appeal dismissed.

Solicitors for appellant: *Justice & Pattenden.*

Solicitors for respondents: *Stow, Preston & Lyttelton, for Macdonald & Longrigg, Bath.*

G. A. S.

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In re BLECKLY.

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[1918. B. 2337.]

Will—Construction—Illegitimate Children—Gifts to "wife," "daughter," "son" and "child or children"—Son and Two Daughters of Marriage—Union with deceased Wife's Sister—Daughter and Two Sons of Union.

Testator, who died in 1917, by his will dated in the same year, after appointing a bank to be his trustee, gave his freehold house, furniture and household effects to his trustee upon trust to permit his "wife," A. M. B., to occupy and use the same during her life, "but only until she shall marry again," and on her death or remarriage he directed that the property should fall into the residuary estate. He gave his residuary real and personal estate to his trustee upon trust to sell, convert and invest, and to pay the income of the investments "to my said wife during her life, but only until she shall marry again," and he expressed his wish that his wife should provide out of her income for his "unmarried daughters," and, after her death, he directed his trustees to raise 1000*l.* for each of his daughters (except one whom he named who was then married) who had attained or should attain twenty-one or had married or should marry, and subject thereto to stand possessed of his residuary estate in trust as portions for "all or any of my sons or a son" living at his death who had attained or should attain

twenty-one, and, if more than one, in equal shares. The testator was married in 1888 and had one son and two daughters, one of whom was still unmarried. In 1894 his wife died, and in 1896 he went through the ceremony of marriage in France with his deceased wife's sister, A. M. M., commonly called A. M. B., by whom he also had three children, one daughter and two sons. The testator lived with A. M. B. until his death, and she was always recognized by his relatives as his wife, and the children of both unions lived with them as one family:—

Held, that there was enough on the face of the will to show that the testator did not intend to use the word "children" in its prima facie sense as meaning legitimate children and to bring the case within the second of the two classes of exceptions to the general rule stated by Lord Cairns in *Hill* v. *Crook* (1873) L. R. 6 H. L. 265, 282, and that the issue of his union with A. M. B. were therefore entitled to take under the will.

Decision of Eve J. reversed.

APPEAL from a decision of Eve J.

Charles Arnold Bleckly by his will dated May 7, 1917, after appointing the Union of London and Smith's Bank, Ld. (now the National Provincial and Union Bank of England), to be executors and trustee thereof and making a specific bequest to "my son" the defendant, Arnold Henry Bleckly, gave (clause 3) his freehold house, 5, Arundel Terrace, Kemp Town, Brighton, together with the furniture and household effects to his trustee upon trust to permit "my wife Ada Morton Bleckly" personally to enjoy the house and to have the use and enjoyment of the effects during her life but only until she should marry again. And he declared that on her death or remarriage, which should first happen, the house and effects should fall into his residuary estate.

By clause 4 the testator gave to "my wife" all his jewellery and consumable stores and also a sum of 250*l.* to be paid to her immediately after his death.

By clause 6 the testator devised and bequeathed the residue of his real and personal estate unto his trustee upon trust to sell and convert and out of the moneys to arise from such sale and conversion to pay his funeral and testamentary expenses, death duties, debts and legacies and to invest the residue of such moneys in manner thereinafter provided and to stand possessed of the investments for the time being representing his residuary estate and the income thereof

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upon the trusts and subject to the powers and provisions thereinafter contained.

Clause 7 was as follows: "My trustee shall pay the income of my residuary estate to my said wife during her life but only till she shall marry again, but my trustee shall not incur any liability for payments made between the date of such remarriage and notice thereof being received by my trustee and it is my wish that my said wife shall out of the income provide for the maintenance and comfort of my unmarried daughters. And after the death or remarriage of my said wife, which shall first happen, my trustee shall out of my residuary estate raise and set aside for each daughter of mine living at my death (except my daughter Elsie Dean Bell the wife of the Rev. Gilbert Ambrose Bell who is otherwise sufficiently provided for) who has attained or shall attain the age of twenty-one years or has married or shall marry under that age the sum of 1000*l.* free of all death duties which are to be paid out of the remainder of my residuary estate and shall invest the sum set aside for each daughter as hereinafter provided and stand possessed thereof and the investments for the time being representing the same (hereinafter referred to as such daughter's portion) and the income thereof upon the trusts and subject to the powers and provisions hereinafter contained concerning the same and subject to raising and setting aside such sums of 1000*l.* as it shall become necessary to raise and set aside and to the payment of the death duties payable in respect thereof shall stand possessed of my residuary estate in trust for all or any of my sons or son living at my death who have or has attained or shall attain the age of twenty-one years and if more than one in equal shares and so that my trustee shall retain the share of each son and stand possessed thereof and the investments for the time representing the same (hereinafter referred to as such son's portion) and the income thereof upon the trusts and subject to the powers and provisions hereinafter contained concerning the same."

By clause 8 he provided that if "any child of mine" should

die in his lifetime leaving issue, such issue should take by substitution his or her parent's share.

By clause 9 the testator declared that his trustee should stand possessed of the portion of "each child of mine" and the income thereof on the following trusts: (i.) to pay the income of the portion of "each daughter of mine" to such daughter during her life; (ii.) during the life of "each son of mine" at the discretion of his trustee to apply the income of his portion for the maintenance support or benefit of all or any of the following persons, namely, such "son" and his wife, if any, and his children or remoter issue; (iii.) after the death of any "child of mine" to hold the income and capital of his or her portion in trust for the issue of such child as he or she should by deed or will appoint, and in default of and subject to such appointment for the issue in equal shares; (iv.) if any "child of mine" should not have any child who under the trust in default of appointment should attain a vested interest in her or his portion then subject to the trusts and powers contained in favour of such child and her or his issue to hold her or his portion in trust for such person or persons as she or he should by will or codicil appoint and subject to such appointment such portion should if the portion of a daughter fall into the testator's residuary estate and if the portion of a son should go and devolve as if he had died in the testator's lifetime without leaving any issue at his death; (v.) "each son of mine" notwithstanding the trusts thereinbefore declared concerning his portion to be entitled to appoint all or any part of the income to a surviving wife.

The testator died on May 13, 1917, and letters of administration with the will annexed were on September 6, 1917, granted to the plaintiff the duly appointed syndic of the bank.

The testator was married on December 15, 1888, to Emmeline Matilda Munton, who died on December 18, 1894.

There was issue of this marriage three children: the defendant Arnold Henry Bleckly, born on November 2, 1889, Elsie Dean Bleckly, born on April 13, 1892, and now

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the wife of the Rev. Gilbert Ambrose Bell, and the defendant, Emmeline Mary Bleckly, born on July 18, 1893.

The defendant, Ada Morton Bleckly, was a sister of Emmeline Matilda Bleckly, and alleged that she went through a ceremony of marriage with the testator at Calais in the Republic of France in January, 1896.

The defendant, Dora Madeleine Bleckly, born February 26, 1896, and the infant defendants, Richard Sanderson Bleckly and Charles Allis Bleckly, born respectively May 2, 1899, and April 23, 1904, were the only children of the testator's union with the defendant, Ada Morton Bleckly.

On November 28, 1918, an originating summons was taken out by the plaintiff for the determination by the Court of the following questions (inter alia) arising on the construction of the will: (1.) whether the defendant, Dora Madeleine Bleckly, was entitled to have set aside a legacy or sum of 1000*l.* and to the enjoyment for life of the income thereof; and (2.) whether the defendants, Richard Sanderson Bleckly and Charles Allis Bleckly, were respectively entitled to any and what share or interest in the testator's residuary trust estate or whether such estate (subject to such (if any) estate or interest as the defendant, Ada Morton Bleckly, might have therein) belonged to the defendant, Arnold Henry Bleckly, subject to the trusts by clause 9 of the will declared concerning his portion.

The defendant, Ada Morton Bleckly, deposed that from the time of her alleged marriage with the testator he maintained a common home for her and the three children of his marriage with Emmeline Matilda Bleckly and her three children; that they all lived together; that her children recognized the testator as their father and were recognized and treated as his children both by the testator and by all their friends and acquaintances; and that she kept and presided over the testator's house and was always in like manner recognized and treated as the testator's wife.

Eve J. held that the illegitimate children of Ada Morton Bleckly were not entitled to any share of the testator's

residuary estate, there being (by reason of the knowledge of the testator that Ada Morton Bleckly was not married to him) no sufficient intention shown on the face of the will to take the case out of the general rule in *Hill* v. *Crook*. (1) He also held that extrinsic evidence derived from an earlier will of the testator was not admissible to explain the meaning of the expressions "each daughter of mine" and "all or any of my son or sons" used in the residuary gift in the will.

The illegitimate children appealed. The appeal was heard on February 3, 1920.

Tomlin K.C. and *Dighton Pollock* for the appellants. It is submitted that on the construction of the will the appellants are entitled to take whether they are legitimate or illegitimate. If the Court is against them on the question of construction then it is submitted that they are legitimate on the ground that the Court will presume in favour of marriage. Dealing first with the question of construction it is submitted that clause 7 of the will is insensible unless the illegitimate daughter Dora and the two illegitimate sons Richard and Charles are included. *Hill* v. *Crook* (2) shows that there are two classes of exceptions to the general rule that the word "children" prima facie means legitimate children. The first is where there are no legitimate children who can come into existence and the second is where the will is insensible if confined to legitimate children. The present case falls within the second class of exceptions. There is here an ambiguity on the face of the will and it is submitted that extrinsic evidence afforded by an earlier will of the testator is admissible for the purpose of showing the sense in which he used the words "my daughter" and "my sons" in the present will: Wigram on Extrinsic Evidence, 5th ed., p. 12, Prop. III. In *In re Ofner* (3) a distinction is drawn between the admission of evidence of extrinsic facts and evidence of intention.

(1) L. R. 6 H. L. 265, 282. (2) L. R. 6 H. L. 265.
(3) [1909] 1 Ch. 60, 67.

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[WARRINGTON L.J. Farwell L.J. there refers to *In re Waller* (1) and *In re Feltham's Trusts.* (2)]

The object here of referring to the earlier will is not for the purpose of ascertaining the testator's intention but to see the way in which he was in the habit of describing the appellants.

The question of construction is put on this ground. On the face of the will the testator regards this lady, who was not his wife, as his wife, as is shown by his reference to her widowhood and possible remarriage. He is not therefore using the term "wife" in its strict sense. The words "wife" and "children" are correlative terms and it is fair, therefore, to suppose that he is using the term "children" in the same correlative sense as he is using the term "wife." The present case is stronger than *Hill* v. *Crook.* (3) There is here a reference to "wife." *In re Pearce* (4) shows that the class may include both legitimate and illegitimate children. See also Hawkins on Wills, 2nd ed., p. 108; *Gill* v. *Shelley* (5); *Leigh* v. *Byron.* (6) The testator must be assumed to have made his will with reference to circumstances to which it could apply. Here, as regards this will there could never be another legitimate child who could take under it because the testator's marriage would have revoked the will.

[YOUNGER L.J. Quoad this will the testator must, as regards the legitimate children, be regarded as dead.]

A case which illustrates the second class of exceptions laid down by Lord Cairns in *Hill* v. *Crook* (7) is *In re Jodrell* (8) affirmed sub nom. *Seale-Hayne* v. *Jodrell.* (9) The testator was there treated as constituting himself his own dictionary.

In re Pearce (10) is distinguishable. There was nothing in the will in that case to raise an ambiguity.

[YOUNGER L.J. If you are within *Hill* v. *Crook* (3) *In re Pearce* (10) does not touch you.]

(1) (1899) 80 L. T. 701.
(2) (1855) 1 K. & J. 528, 532.
(3) L. R. 6 H. L. 265.
(4) [1914] 1 Ch. 254, 267.
(5) (1831) 2 Russ. & My. 336.
(6) (1853) 1 Sm. & Giff. 486.
(7) L. R. 6 H. L. 265, 282.
(8) (1890) 44 Ch. D. 590, 605, 607.
(9) [1891] A. C. 304, 305.
(10) [1914] 1 Ch. 254.

In re Corsellis (1) does not carry the matter any further. It was a similar case to *In re Jodrell.* (2) *In re Helliwell* (3) shows that when once a testator introduces into his will an artificial relationship that relationship must be worked out to its logical conclusion notwithstanding that the circumstances may be complicated.

If the Court is against the appellants on the question of construction they desire to argue the point that having regard to the Deceased Wife's Sister's Marriage Act, 1907 (7 Edw. 7, c. 47), they are in fact legitimate.

[LORD STERNDALE M.R. I think we had better first hear what is said by the other side on the question of construction.]

Harold Christie (*C. A. Bennett* with him) for the respondent Arnold, the only legitimate son. The Court ought to hold on the construction of this will that the word "children" has its prima facie meaning of legitimate children.

In order to bring the case within the first class of exceptions in *Hill* v. *Crook* (4), the appellants must show that there would have been an intestacy if the three illegitimate children had died before the testator.

[WARRINGTON L.J. Suppose all the illegitimate children had died in the testator's lifetime you could not give effect to the will.]

It is submitted that you could still do so. There is no difficulty in giving effect to the case of a single son. It is provided for by a common form precedent. I am not driven by necessary implication to include illegitimate children in order to give a reasonable meaning to the will. Then whether the case comes within the second class of exceptions in *Hill* v. *Crook* (4)—whether the testator has constituted himself his own dictionary—it is submitted that in order to come to that conclusion you must find a definite dictionary.

In *Edmunds* v. *Fessey* (5) where the gift was "to each

(1) [1906] 2 Ch. 316.
(2) 44 Ch. D. 590.
(3) [1916] 2 Ch. 580.
(4) L. R. 6 H. L. 265.
(5) (1861) 29 Beav. 233.

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of the sons and daughters of my late cousin A." who had died, leaving two legitimate and one illegitimate sons, and only one daughter, who was illegitimate, it was held a gift to the legitimate sons and to the only daughter, and the illegitimate son was excluded. The case is not one on which I can entirely rely having regard to the last passage of the judgment. There the illegitimate daughter was brought in because there was no other daughter, and the illegitimate son excluded because there were legitimate sons. The judge there felt that he had to give some meaning to the word "daughters."

One must put oneself in the position of the testator. There must be something more than a probability that he meant to include illegitimate children. The use of the word "children" in the plural and the fact that he called their mother his "wife" are not conclusive, apart from extrinsic evidence, that he regarded his children as legitimate.

In *Dorin* v. *Dorin* (1) it was held in the case of a married man who had only illegitimate children at the date of his will that a bequest by him to his children did not mean his illegitimate children.

[WARRINGTON L.J. There was nothing on the face of the will in that case to indicate that the testator used the word "children" in other than its usual sense.]

In *Cartwright* v. *Vawdry* (2) a bequest to the testator's children, there being at the date of the will three legitimate and one illegitimate, and the income being directed to be applied in fourths for their maintenance, was held to exclude the illegitimate child.

Sheldon for the trustee.

Tomlin K.C. was not called on to reply.

LORD STERNDALE M.R. This is an appeal from a decision of Eve J. which raises a question on the construction of the will of Charles Arnold Bleckly. The will is dated May 7, 1917, and the testator died on May 13 of the same year.

(1) (1875) L. R. 7 H. L. 568. (2) (1800) 5 Ves. 530.

By it he appointed the Union of London and Smith's Bank, Ld., now the National Provincial and Union Bank of England, his executor and trustee.

The question arises under the following circumstances: The testator married in 1888 and his wife died in 1894. There were three children of the marriage, Arnold Henry Bleckly, Elsie Dean Bleckly, now the wife of the Rev. Gilbert Ambrose Bell, and Emmeline Mary Bleckly, who is still unmarried. Mrs. Bleckly, who had been Matilda Munton, had a sister Ada Morton Munton, and in January, 1896, according to her evidence, she went through a ceremony of marriage with the testator at Calais, and they lived together thenceforth as husband and wife, and were so received by his relations. There were three children of that marriage, a daughter Dora Madeleine and two sons, the infant defendants, Richard and Charles, born in 1899 and 1904 respectively. By his will the testator gave his freehold house, furniture and effects to the bank, his trustee, upon trust to permit his "wife," Ada Morton Bleckly, personally to enjoy the said house, and to have the use and enjoyment of the said effects during her life "but only until she should marry again," and declared that on her death or remarriage the said house and effects should fall into his residuary estate. He gave his residuary real and personal estate to his trustee upon trust to sell and convert and invest the proceeds and hold the investments representing his residuary estate upon the trusts therein mentioned. The testator then provided (clause 7) that: "My trustee shall pay the income of my residuary estate to my said wife during her life but only till she shall marry again," and he expressed his wish that his wife should out of the income provide for the maintenance and comfort of "my unmarried daughters." And after her death or remarriage he directed his trustee out of his residuary estate to raise and set aside for "each daughter of mine living at my death" (except his daughter Elsie Dean Bell, the wife of the Rev. Gilbert Ambrose Bell, who was otherwise sufficiently provided for) who had attained or should attain the age of twenty-one years, or had married

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or should marry under that age, the sum of 1000*l.*, and subject thereto to stand possessed of his residuary estate in trust for all or any of his sons or a son living at his death who attained or should attain the age of twenty-one years if more than one in equal shares. Then he provided that if any child of his should die in his lifetime leaving issue living at his death such issue attaining the age of twenty-one years or being a female marrying under that age should take by substitution, if more than one, as tenants in common in equal shares, the portion such his child would have taken if he or she had been living at his death and attained a vested interest. And he declared that his trustee should pay the income of the portion of each daughter of his to such daughter during her life for her separate use without power of anticipation.

The question is whether the daughters of Ada Morton Munton, generally known as Ada Bleckly, take anything under the testator's will. There was a question whether Mrs. Bleckly was entitled to a life interest under the will, but that was decided by Eve J. in her favour, and there is no appeal on that point. There was no doubt on the will but that the testator was there speaking of her by name as his wife, and that on the true construction of the will she was entitled to such life interest. But the question is different with regard to the children. The word "child" prima facie means legitimate child, and that meaning cannot be lightly or easily displaced, and certainly not because the Court may think that the testator had it in his mind to benefit illegitimate children. The question is whether there are sufficient indications upon the face of the will itself to enable the Court to construe the word "child" so as to include illegitimate children. I pronounce no opinion whether the children here are in fact illegitimate. I am assuming, for the purposes of the present case, that the children in question are illegitimate, but counsel for the appellants has intimated that if necessary he is prepared to argue that they are legitimate.

The case which is always referred to on this point is

Hill v. *Crook* (1), where Lord Cairns stated two classes of exceptions to the ordinary rule. The first is where it is impossible from the circumstances for legitimate children to take under the bequest; but that is not the case here. The second exception is stated in the language of the noble and learned Lord as follows: "Where there is upon the face of the will itself, and upon a just and proper construction and interpretation of the words used in it, an expression of the intention of the testator to use the term 'children' not merely according to its prima facie meaning of legitimate children, but according to a meaning which will apply to, and which will include, illegitimate children." Those two exceptions have been held in more than one case to be complete and exhaustive. In my opinion the present case does come within the second exception. There is sufficient upon the face of the will itself to show that the testator must have intended to include these illegitimate children. There was something, though by itself not enough, to indicate that intention in the way the testator speaks of their mother as his "wife." Lord Cairns says (2): "It appears to me that the terms 'husband' and 'wife,' 'father' and 'mother,' and 'children' are all correlative terms. If a father knows that his daughter has children by a connection which he calls a 'marriage,' with a man whom he calls her 'husband,' terming the daughter the 'wife' of that husband, I am at a loss to understand the meaning of language if you are not to impute to that same person when he speaks of the 'children' of his daughter this meaning, that as he has termed his daughter and the man with whom she was living 'wife' and 'husband,' so also he means to term the offspring born of that so-called 'marriage' the children according to that nomenclature." That is not enough in this case, and it is only a slight indication pointing in the direction which the testator intended.

But having regard to the circumstances of the case, there is considerably more in the argument that it is not

(1) L. R. 6 H. L. 265, 282, 283. (2) L. R. 6 H. L. 265, 285.

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possible to give an effective operation to the will without including illegitimate children.

The first and most important expression of that intention is to be found in the desire of the testator that "my said wife shall out of such income provide for my unmarried daughters." At the date of the will the testator had only one legitimate unmarried daughter. It is difficult to give effect to the words "unmarried daughters" without including "illegitimate daughters." Again we have the expressions "each daughter of mine living at my death" and "son or sons living at my death." It certainly looks as if the testator contemplated and provided for the actual state of things which in fact existed. There is authority to show that where words are used in the plural, and cannot be satisfied by treating the gift as one to legitimate children only, there being but one legitimate child, the illegitimate child or children may take under the gift, together with the legitimate child: *Gill* v. *Shelley* (1); *Leigh* v. *Byron*. (2) The parents of the children in both those cases were dead, and no more legitimate children could come into existence. That is not the case here. At the time the will was made both the testator and Ada Bleckly were alive but no more legitimate children who could take under the gifts in the will could come into existence because upon the testator's marriage the will would have been revoked. The class of children therefore was effectually closed. That circumstance makes the rule in the two latter cases applicable to the present case. The learned judge in the Court below took a different view, from which I regret to say I dissent, and seems to have laid some stress on the fact that the testator could have been under no misapprehension, but must have known that the children were illegitimate. That seems to me, on the other hand, to work rather in favour of including them. So far as it goes, when he uses words in the plural which are inapplicable to existing legitimate children he must have meant illegitimate children. I am inclined to assume that the testator did know the canon of construction

(1) 2 Russ. & My. 336. (2) 1 Sm. & Giff. 486.

which would confine the gifts to legitimate children, but we must interpret the will, not by the testator's knowledge of the law, but by the law as it exists in fact. The appeal must be allowed.

WARRINGTON L.J. I am of the same opinion. We are invited to deal with the question as one purely of construction, and for the purposes of the case the children of Ada Bleckly are assumed to be illegitimate, though they may turn out to be legitimate after all. The facts which give rise to the question are these. [His Lordship stated the facts and continued:] The question being one of construction one has to bear in mind the well-known rule of construction that the term "children" prima facie means legitimate children. But in *Hill* v. *Crook* (1) Lord Cairns mentions two classes of cases in which the prima facie interpretation is departed from. The second class is thus described: "Where there is upon the face of the will itself, and upon a just and proper construction and interpretation of the words used in it, an expression of the intention of the testator to use the term 'children' not merely according to its prima facie meaning of legitimate children, but according to a meaning which will apply to, and which will include, illegitimate children." I look to the will in this case to see whether, having regard to the relevant facts, the testator has used the word "children" in the wider sense, so as to include illegitimate children. Ever since the union of the testator with his deceased wife's sister commenced, the whole family lived together as one family. The testator refers to Ada Morton Bleckly as his wife, speaks of her widowhood and possible remarriage exactly as a man would speak of his wife who in law occupied that position. He desires her to provide for the maintenance and comfort of his unmarried daughters. At the date of the will there was only one unmarried daughter, if the illegitimate daughter be excluded. Again the expression "each daughter of mine" suggests that there were more daughters than one, and unless Dora,

(1) L. R. 6 H. L. 265, 283.

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a child of Ada Bleckly, is included, there was only one daughter. Again, unless you include Richard and Charles, or one of them, there is no son who had not then attained the age of twenty-one. If he had intended to confine the benefit to his legitimate son Arnold, all these provisions for the benefit of his sons are out of place. The general result to my mind is clear. The testator by the expressions he has used and to which complete effect cannot be given unless illegitimate children are included, has shown that he did not intend to use the word "children" in its ordinary sense of "legitimate children." There could be no more legitimate children born who could take under this will, because if the testator had married either Ada M. Munton or some other person, the will would have been revoked. With all respect to the learned judge the fact that the testator knew all the circumstances is, if it has any bearing, rather in favour of the wider construction being given to the word "children" than against it. On the whole I come to the conclusion on the construction of this will that the testator has clearly shown that he intended to use the words "sons" and "daughters" in the wider sense, so as to include his whole family.

YOUNGER L.J. I am of the same opinion. We must approach the consideration of this will on the footing that the ceremony of marriage between the testator and the lady he calls his wife is not even now to be regarded as a valid ceremony of marriage, and that the children, the issue of the union, are not legitimate. It may be that both these assumptions are entirely erroneous but we must make them. Now it is quite clear upon the authorities that you may have a class of children composed of both legitimate and illegitimate children: and it is, I think, manifest in the case of this will, that if you do not include amongst the testator's children for whom he has provided, children, for present purposes assumed to be illegitimate, you do not give adequate effect to the expressions used in his will. [His Lordship referred to the facts and continued:] Now it is to be noted that if the testator must use one comprehensive term in relation

to all of these children, he could only find it in their relationship to himself: and while his object in using such a term may not be difficult to conjecture, his adoption of the necessary phraseology constitutes, as I think, the only difficulty in the way of the appellants. The testator describes all his children collectively as "my" children. There is no direct reference to Ada Morton Bleckly, whom, as I have said, he describes as his wife, as the parent of any of them. Now of course it was no part of the appellants' case that any illegitimate children of the testator, if any such there were, other than the children by Ada Morton Bleckly could be included in the class. But if on the true construction of this will it is necessary, if you go beyond legitimate children at all, that you must include illegitimate children by any mother, then, as it appears to me, there would be great difficulty in the appellants' way. But the Court is entitled to interpret this like any other will, in the light of the surrounding circumstances, and when you find, as you do here, that the children of the testator by his first and only marriage and the children of this lady and the testator lived together in one household as one family, and that it is with reference to them that the will is framed—in the direction, for instance, to his "wife" to provide for the maintenance and comfort of "my unmarried daughters"—and when you find in that and many similar provisions that it is impossible to give an adequate meaning to the words used with regard to the testator's children without including as the objects of his bounty children other than those of his undoubted marriage, then, in my opinion, you must, in the circumstances of this case, include his children by Ada Morton Bleckly, but you need not include any other children. And that children other than those of the testator's recognized marriage must be included if adequate effect is to be given to the words of his will is emphasized by another consideration. For the reasons pointed out by the Master of the Rolls it is impossible that there could have been brought into existence any further legitimate children entitled to take as such under this will because the marriage which,

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on the hypothesis on which this judgment proceeds, it would have been necessary for the testator in the first instance to contract would ipso facto have revoked this will. So you have here a class of legitimate children legally incapable of increase: a true counterpart of those cases alluded to by my Lord where by reason of the death of the parent de cujus the class is physically incapable of extension. I agree that the appeal should be allowed.

LORD STERNDALE M.R. I do not wish to be taken as expressing any opinion as to the admissibility of the extrinsic evidence which it was proposed to adduce in this case.

Appeal allowed.

Solicitors: *Coward & Hawksley, Sons & Chance; P. F. Walker, for Field & Sons, Liverpool.*

W. I. C.

C. A. 1920 Feb. 12.

In re EXPRESS ENGINEERING WORKS, LIMITED.

Company—Private Company—Debentures—Issue by Directors not entitled under Articles to vote—Directors constituting whole Body of Shareholders—Power to waive Technicalities—Ratification—Validity.

A syndicate of five persons formed a private company, in which they were the sole shareholders, and sold to it for 15,000*l.* in debentures of the company, property which they had, a few days before, acquired for 7000*l.* The contract for the sale and the issue of the debentures was carried out at a meeting of the five who there and then appointed themselves directors. This meeting was described in the minutes as a board meeting. At a subsequent meeting the seal of the company was affixed to the debentures. The articles of the company provided that no director should vote in respect of any contract or arrangement in which he might be interested. In the winding up of the company the liquidator claimed a declaration that the issue of the debentures was invalid and should be set aside:—

Held, there being no suggestion of fraud, that the company was bound in a matter intra vires by the unanimous agreement of its members. Although the meeting was styled a directors' meeting, all the five shareholders were present, and they might well have turned

it into a general meeting, and transacted the same business. In these circumstances the issue of the debentures was not invalid.

Decision of Astbury J. affirmed.

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EXPRESS ENGINEERING WORKS, LIMITED, *In re.*

APPEAL from a decision of Astbury J.

The company was registered as a private company on February 26, 1918. It was formed with the object of acquiring certain assets from a syndicate consisting of five persons who, a few days before the company was formed, had purchased them for 7000*l.* These five persons were the only shareholders of the company, two of them being signatories of the memorandum of association. On March 11, 1918, a meeting, described in the minutes as the first board meeting, was held, at which all the five shareholders were present, and they were then and there appointed as directors. The meeting then resolved that the company should purchase the assets of the syndicate for 15,000*l.*, to be paid for by the issue of debentures for that amount, bearing interest at 12 per cent. The debentures were issued, and on March 25, at a further meeting, the seal of the company was affixed to them. They were afterwards transferred to a syndicate called the General Maritime Trust, Ld., which consisted of four of the members of the company. Art. 9 of the company's articles provided that a director might contract with, and be interested in any contract or arrangement with the company, but no director should, as a director, vote in respect of any contract or arrangement in which he might be interested. In March, 1919, the company was ordered to be wound up, and a summons was taken out by the liquidator for a declaration that the issue and transfer of the debentures were invalid and should be set aside. There was no suggestion of any intention on the part of the corporators of defrauding subsequent shareholders or creditors.

Astbury J. dismissed the summons on the ground that every member of the company having assented to the transaction the company was bound in a matter intra vires by the unanimous agreement of its members.

The liquidator appealed.

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Clauson K.C. and *P. B. Morle* for the liquidator. Those who take advantage of the statutory power to form a private company must conform to the rules in accordance with which the business of such a body must be transacted. In order to bind the company the issue of these debentures must have been sanctioned by a duly constituted general meeting. For the purpose of binding a company in its corporate capacity the mere individual assent of the corporators does not take the place of a resolution properly passed at a duly constituted meeting: *In re George Newman & Co.* (1)

It may be admitted that if these five persons had chosen to do so, they might have put themselves in order by waiving technicalities as to notice and constituting themselves as a meeting of shareholders; but they did not do so, and the consequence is that the issue of the debentures not having been sanctioned by a general meeting is invalid. Whether or not all the corporators could waive all questions of notice, they could not waive this, that the company must act through its regular organ—i.e., a general meeting. The sanction of the individual corporators is not enough; it must be expressed at a general meeting of the company. The debentures were never validly issued so as to bind the company. It is submitted that the case is covered by *In re George Newman & Co.* (1)

Maugham K.C. and *P. F. Wheeler* for the respondents. Assuming all that has been urged on behalf of the appellant to be correct it is submitted that the agreement for the sale of the assets in consideration of the issue of the debentures is not void but only voidable. The company has had the benefit of the assets and cannot now dispute the validity of the debentures. The question is whether the company or its contractors have not so acted as to prevent the transaction being avoided: *Erlanger* v. *New Sombrero Phosphate Co.* (2) The liquidator cannot approbate and reprobate. The company must be taken to have ratified

(1) [1895] 1 Ch. 674, 686. (2) (1878) 3 App. Cas. 1218.

the transaction. The right to rescission is gone as it was in *Salomon* v. *Salomon & Co.* (1) The technical point that the directors could not vote is equivalent to what happened in *Salomon's Case.* (1) The agreement could be, and, it is submitted, was in effect ratified by the whole body of corporators.

[YOUNGER L.J. referred to *Broderip* v. *Salomon.* (2)]

If the secretary had written into the minutes "At this point the meeting was turned into a meeting of shareholders" all would have been in order.

Morle in reply. The meeting of March 11 was throughout treated as a meeting of the directors. The transaction was invalid inasmuch as it was not carried out in accordance with the necessary formalities.

LORD STERNDALE M.R. (after stating the facts). It was contended on the one hand that the issue of the debentures was invalid for this reason, that all the directors being interested parties were precluded by art. 9 from voting, and that though the five persons acting together as corporators undoubtedly could make the contract they could only do so in a properly constituted general meeting. On the other hand it was argued that the contract could not be called invalid if every shareholder knew of and sanctioned it; and further, that whatever the draftsman of the minutes may have styled the meeting, it was in fact a meeting of all the corporators, and they were able, whatever they might call themselves, to waive technicalities and meet together and make any contract they chose. As authority for that the appellant relied upon what was said by Lindley L.J. in delivering the judgment of the Court in *In re George Newman & Co.* (3)

"It may be true, and probably is true, that a meeting, if held, would have done anything which Mr. George Newman desired; but this is pure speculation, and the liquidator, as representing the company in its corporate capacity, is

(1) [1897] A. C. 22. (2) [1895] 2 Ch. 323, 327.
(3) [1895] 1 Ch. 674, 686.

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entitled to insist upon and to have the benefit of the fact that even if a general meeting could have sanctioned what was done, such sanction was never obtained. Individual assents given separately may preclude those who give them from complaining of what they have sanctioned; but for the purpose of binding a company in its corporate capacity individual assents given separately are not equivalent to the assent of a meeting."

There were, however, two differences between that case and the present one. First, the transaction there was ultra vires, and, secondly, in that case there never was a meeting of the corporators. In the present case these five persons were all the corporators of the company and they did all meet, and did all agree that these debentures should be issued. Therefore it seems that the case came within the meaning of what was said by Lord Davey in *Salomon* v. *Salomon & Co.* (1) "I think it an inevitable inference from the circumstances of the case that every member of the company assented to the purchase, and the company is bound in a matter intra vires by the unanimous agreement of its members." It is true that a different question was there under discussion, but I am of opinion that this case falls within what Lord Davey said. It was said here that the meeting was a directors' meeting, but it might well be considered a general meeting of the company, for although it was referred to in the minutes as a board meeting, yet if the five persons present had said, "We will now constitute this a general meeting," it would have been within their powers to do so, and it appears to me that that was in fact what they did. The appeal must therefore be dismissed.

WARRINGTON L.J. (after stating the facts). It happened that these five directors were the only shareholders of the company, and it is admitted that the five, acting together as shareholders, could have issued these debentures. As directors they could not but as shareholders acting together they could have made the agreement in question. It was

(1) [1897] A. C. 22, 57.

competent to them to waive all formalities as regards notice of meetings, etc., and to resolve themselves into a meeting of shareholders and unanimously pass the resolution in question. Inasmuch as they could not in one capacity effectually do what was required but could do it in another, it is to be assumed that as business men they would act in the capacity in which they had power to act. In my judgment they must be held to have acted as shareholders and not as directors, and the transaction must be treated as good as if every formality had been carried out. I agree that the appeal should be dismissed.

YOUNGER L.J. I am of the same opinion. I am content to rest my conclusion upon what was said by Lord Davey in *Salomon's Case* (1), that a company is bound in a matter which is intra vires by the unanimous agreement of all the corporators. No fraud is alleged in respect of this transaction, and it seems to me that the effect of the resolution of March 11 was that the company by the voice of all its shareholders became bound by this agreement, and I agree with the view that when all the shareholders of a company are present at a meeting that becomes a general meeting and there is no necessity for any further formality to be observed to make it so. In my opinion the true view is that if you have all the shareholders present, then all the requirements in connection with a meeting of the company are observed, and every competent resolution passed for which no further formality is required by statute becomes binding on the company. Moreover, if this agreement were ever impeachable it was only so as being voidable, and the liquidator, therefore, could only succeed if he were in a position to return the assets. I am however of opinion that the agreement was never at any time either void or voidable. All the shareholders were bound by it. I agree that the appeal should be dismissed.

Solicitor for the appellant: *F. H. Stollard.*
Solicitors for the respondents: *Roney & Co.*

(1) [1897] A. C. 22, 57.

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In re LYNE-STEPHENS AND SCOTT-MILLER'S CONTRACT.

[1919. S. 1996.]

Vendor and Purchaser—Sale of Freehold House "in possession"—Property let on Lease—Completion fixed for same Date as Expiration of Lease—Sum paid by Lessee in Respect of Dilapidations between Date of Contract and Completion—Claim by Purchaser.

On July 8, 1919, the purchaser bought a freehold house at a sale by auction from the vendor. In the particulars of sale it was stated that the property was "let on lease expiring September 29, 1919, at a rent of 500*l.* per annum, and to be sold with possession on completion of the purchase." The conditions of sale (condition 3) provided that the purchase should be completed on September 29, 1919. Condition 4 was as follows: "Possession or receipt of the rents and profits will be retained, and all outgoings discharged by the vendor up to the said 29th day of September next, and as from that day the outgoings, including any rates made but not demanded till after that day, shall be discharged by, and possession shall belong to the purchaser, and the outgoings shall, if necessary, be apportioned for the purpose of this condition, but the purchaser shall not be let into actual possession of the property until the completion of the purchase." At the date of the contract the property was in a bad state of repair, and the lessee was bound under his lease to make good the repairs. In the interval between the contract and completion, namely, about August 28, 1919, the amount payable by the lessee was arranged between the vendor and lessee at 2060*l.*, and that amount was paid into a joint account, the rights of the vendor and purchaser thereto being reserved. The purchase was completed in the afternoon of September 29, 1919. On a summons taken out by the purchaser under the Vendor and Purchaser Act, 1874, asking for a declaration that he was entitled to moneys payable at or at any time after the date of the contract of July 8, 1919, by the lessee of the property sold, as compensation for breaches of the repairing or other covenants by the lessee:—

Held (affirming the decision of Sargant J.), that what was sold was not the house subject to and with the benefit of the lease which was existing at the date of the contract, but the house with possession, altogether apart from and independent of the lease, the obligations and rights under which were only a matter between the vendor and the lessee, and that the purchaser was therefore not entitled to the sums paid by the lessee as compensation for his breaches of covenant.

In re Edie and Brown's Contract (1888) 58 L. T. 307; [1888] W. N. 20 approved.

On July 8, 1919, Walter Scott-Miller bought at a sale by auction, from S. E. V. Lyne-Stephens, a freehold house and

lands at Roehampton for 8900*l.*, and paid the required deposit of 890*l.* and signed an agreement to pay the remainder of the purchase-money and complete the purchase according to the annexed conditions of sale.

The particulars of sale, attached to the conditions, stated that the property was "let on lease expiring 29th September, 1919, at a rent of 500*l.* per annum, and to be sold with possession on completion of the purchase."

The conditions of sale, so far as material, were as follows :—

"3. The remainder of the purchase-money shall be paid on the 29th day of September next at the office, No. 9, New Square, Lincoln's Inn, London, of Messrs. Walters & Co., the vendor's solicitors, at which time and place the purchase shall be completed. If from any cause whatever, other than the wilful default of the vendor, the purchase shall not be completed on or before the said 29th day of September, the purchaser shall pay to the vendor interest at the rate of 5*l.* per cent. per annum on the balance of the purchase-money from that date to the day of actual payment thereof, and shall not be entitled to any compensation for the vendor's delay or otherwise, but this stipulation is without prejudice to the vendor's rights under any other of these conditions."

"4. Possession or receipt of the rents and profits will be retained, and all outgoings discharged by the vendor up to the said 29th day of September next, and as from that day the outgoings, including any rates made but not demanded till after that day, shall be discharged by, and possession shall belong to the purchaser, and the outgoings shall, if necessary, be apportioned for the purpose of this condition, but the purchaser shall not be let into the actual possession of the property until the completion of the purchase."

"9. On payment of the balance of the purchase-money at the time and place aforesaid the purchaser shall be entitled to a proper assurance of the property from the vendor and all other necessary parties (if any) such assurance and every other instrument, act, matter or thing which shall be required by the purchaser for getting in or releasing any outstanding estate, right or interest, or for completing the vendor's title,

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or for any other purpose, to be prepared, made and done by and at the expense of the purchaser, and to be left for execution by the vendor not less than 14 days before the said 29th day of September next."

At the date of the contract the property was in an extremely bad state of repair, having been for some time occupied by soldiers, and the lessee was bound under his lease to make good the repairs.

In an affidavit made by the auctioneer he stated as follows: "At the auction on July 8, 1918, I made the following statement from the rostrum: 'The place has been most cruelly treated by soldiers in occupation, but the damage is mostly superficial, and by reasonable expenditure the place can be restored to its old beauty.' I made this statement (which I had prepared and written down) because, although purchasers of house property are supposed to, and generally have, acquainted themselves with its state of repair, I thought it fair that intending purchasers should have notice that a considerable outlay would be required upon the house. No questions were asked at the sale as to the lease or dilapidations." Sargant J. accordingly held, and it was not contested by the purchaser, that he must be deemed to have had notice, at the date of his purchase, of the state of repair of the property.

When the abstract of title was delivered the purchaser delivered the following (amongst other) requisitions:—

"7. Reference is made in the deed of January 23, 1912, to a lease to H. H. Wilson for 14 years from June 24, 1911, stated to be determinable at Michaelmas, 1919. The lease should be abstracted and produced, and the vendor must produce evidence that the lease has been determined in accordance with the terms thereof."

"8. By the 4th condition of sale the vendor is entitled to retain possession, or receipt of the rents and profits up to September 29 next, the day fixed for completion. The purchaser will be entitled to all such rights as may exist under the lease above mentioned other than such rents and profits."

"9. The purchaser is entitled, according to the contract,

to possession on September 29 next. It should be pointed out that on that day the lease will be subsisting, even if notice of determination has been given."

The vendor's solicitors' answer to these three requisitions was that "the vendor cannot admit these contentions of the purchaser." As his Lordship found, "they naturally declined to admit that the lease had been determined, on September 29, 1919, under an option contained in the lease, so that they could give possession; they declined to give particulars of the contents of the lease; and declined to admit the purchaser's right to receive any part of any sum that might be paid by the lessee in respect of dilapidations."

In the interval between the contract and completion—namely, about August 28, 1919—the amount payable by the lessee was arranged between the vendor and the lessee at 2,060*l.*, and it was arranged between the vendor and the purchaser that the amount should be paid to a joint account reserving the rights of the vendor and purchaser thereto.

The purchase was completed on September 29, 1919, some hours before midnight.

The purchaser took out a summons under the Vendor and Purchaser Act, 1874, asking for a declaration that he was entitled to receive all moneys payable, at or at any time after the date of the contract of July 8, 1919, by the lessee of the property sold, as compensation for or in respect of the breaches of the repairing or other covenants by the lessee contained in the lease; and the summons was heard by Sargant J. on December 4, 5, 1919.

Rolt K.C. and *C. Farwell* for the purchaser. The question is, What did the purchaser buy? Where a term begins "from" a specified date, it lasts during the whole anniversary of that date: Foà on Landlord and Tenant, 4th ed., 113; *Ackland* v. *Lutley*. (1) The lease did not expire until midnight of September 29–30, and as the lease was in existence when the purchase was completed in the afternoon of September 29, the reversion, however small, passed to the purchaser and carried with it the

(1) (1839) 9 Ad. & E. 879, 894.

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right to the money which the lessee was liable to pay. By condition 4 possession or receipt of the rents and profits is to be retained by the vendor only up to September 29, after which possession is to belong to the purchaser, although he is not to be let into actual possession until completion, so that on completion the purchaser was absolutely entitled to the reversion. After that, if the money had not been paid by the lessee, the purchaser would have been the person to sue him for it. As between a tenant for life and a remainderman impeachable for waste, damages recovered for breach of a lessee's covenant to repair are capital and not income: *In re Pyke* (1); *In re Lacon's Settlement* (2); and the vendor is only entitled to such rents and profits as a tenant for life impeachable for waste is entitled to, the purchaser being entitled in equity to all things which belong to the owner of the inheritance as against a tenant for life impeachable for waste, such as timber trees blown or cut down or minerals gotten after the contract either by a trespasser or by the vendor otherwise than in working up to the proper time for completion mines or quarries open at the time of sale: Williams on Vendor and Purchaser, 2nd ed., p. 508.

In the interval between contract and conveyance the property belongs in equity to the purchaser, for whom the vendor is constructively a trustee: Williams on Vendor and Purchaser, 2nd ed., pp. 49, 50, 506; *Shaw* v. *Foster* (3); *Lysaght* v. *Edwards* (4). The vendor will rely on *In re Edie and Brown's Contract* (5), but that case is distinguishable.

[They also referred to *Rayner* v. *Preston* (6); Conveyancing Act, 1881, s. 10; Conveyancing Act, 1911, s. 2; *Clarke* v. *Ramuz* (7) and *Phillips* v. *Silvester*. (8)]

Romer K.C. and *Sheldon* for the vendor. The purchaser's argument is based on a technical rule rather than on the real facts of the case. First, he says that, as from the date of the contract, the vendor is a trustee for him; and secondly,

(1) [1912] 1 Ch. 770.
(2) [1911] 2 Ch. 17.
(3) (1872) L. R. 5 H. L. 321, 338.
(4) (1876) 2 Ch. D. 499, 506.
(5) 58 L. T 307.
(6) (1881) 18 Ch. D. 1.
(7) [1891] 2 Q. B. 456.
(8) (1872) L. R. 8 Ch. 173.

that he is entitled to have a conveyance some time before midnight on September 29, and therefore gets a bit of reversion which carries with it the right to the damages. But the real question turns on the construction of the contract, and that contract does not give the purchaser what he claims. *In re Edie and Brown's Contract* (1) is in the vendor's favour, and is, moreover, a case on real property law, over thirty years old, which has found its way into the text-books and should not now be disturbed. The rent was not due until the midnight of September 29, though a demand for rent must be made before sunset: *Duppa* v. *Mayo*. (2) The purchaser bought a house in possession, not a reversion. The Conveyancing Acts do not help the purchaser.

[They also referred to *Martyn* v. *Williams*. (3)]

Rolt K.C. in reply.

SARGANT J. (after stating the facts). The vendor and the purchaser agree as to the actual terms of completion, that what was done on that completion, the date when the conveyance was made, and so on, does not affect the question between the parties. All rights were reserved by the arrangement which was made, and the rights of the parties depend upon the contract and nothing else.

The purchaser says that a vendor, speaking generally, is a trustee for him of the property sold, subject to the completion of the contract, and that when the completion takes place the trust becomes an absolute one. A number of decisions were cited for that proposition, one instance being the right of the purchaser to any windfall of timber. The vendor does not dispute that general proposition, but says: "What was it that was sold? It was not the house subject to and with the benefit of the lease which was existing at the date of the contract, but it was the house with possession, altogether apart from and independent of the lease, the obligations and rights under which were simply and solely a matter between the vendor and the lessee." In my judgment, that contention of the

(1) 58 L. T. 307.
(2) (1671) 1 Wms. Saund., 1871 ed., 380, 435.
(3) (1857) 1 H. & N. 817.

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vendor is correct. The lease is mentioned in the particulars of sale, but this mention, which was very much relied on by the purchaser, is explicable as indicating what the position of the vendor was at that time. It might, for instance, affect the right of the purchaser to go and look at the property, or—and this is more material—be intended to indicate the rental value of the property, and therefore afford some measure of the price which was properly payable for the property. I do not think that the lease was mentioned for the purpose of indicating to the purchaser any rights which he was to acquire or any obligations to which he would be subject. If that had been the object, then, in accordance with the usual practice, an opportunity would have been given to the purchaser of seeing a copy of the lease in order to acquaint himself with his rights and obligations thereunder. That view of mine is very strongly confirmed by the statement that the property is to be sold with possession on completion of the purchase. I think that those words clearly indicated and held out to the purchaser that he was to take the property in possession—both physically and legally—and was not to take a property which was in any way encumbered or affected by the provisions of the lease.

Then I have to deal with the extremely important condition 4. There is no mention whatever in that condition of any receipt of rents, or anything of that kind, by the purchaser, and there is no provision therein for the apportionment of the rents referred to. It seems to me that condition 4 points to this—that the purchaser was to have possession of the property absolutely divorced from the lease.

But the contention on behalf of the purchaser—and it is a very subtle and technical argument, although no doubt it is the best that could be presented on his behalf—is that the completion of the purchase, which was to be on September 29, 1919, could not, according to ordinary business habits, take place at midnight of September 29–30, but must take place, if in fact it did take place, at some time in the business day—that is to say a few hours before the time when the lease expired ; that the purchaser would, on completion, take the

property while a few hours of the lease had still to run ; and, therefore, that the purchaser would on completion become entitled to the reversion, as a purchaser of it, and would be entitled to all the benefits which would naturally go with the reversion, including the right to sue the lessee for breach of any covenant to yield up the property in a proper state of repair.

The answer to that contention seems to be that the precise date or hour of the execution and the taking effect of the conveyance were really matters of machinery only, and that the machinery must be adapted to give effect to the true bargain as collected from the contract as a whole ; not that the effect of the contract as a whole should be modified for the purpose of giving effect to the working out of the machinery. That seems to be the position. The nature of the machinery, at the most, cannot do more than give some indication of the true meaning of the contract if it is ambiguous in other respects. It cannot override the clear indications I find in the contract of the fact that the purchase was to be a purchase of property in possession which was not sold subject to a lease, and a purchase which would take effect at the last moment of September 29 and give possession to the purchaser, to quote condition 4, "as from that day," that is to say, from and after the stroke of midnight between September 29 and September 30.

I am reminded as to that of a decision of Chitty J. in *In re Peck and the London School Board* (1) as to the effect of the Conveyancing Act, 1881, on easements. Sect. 6 of the Act provided that a conveyance should impliedly include many easements, and it was contended, on behalf of the purchasers, that they were entitled to have included in the conveyance by implication all the general words found in the section. Chitty J. took the view that the object of the Act was to alter the effect of conveyances, but not to alter the effect of contracts, and that, if the effect of a conveyance in the bare terms on which the Act would operate would be to convey to the purchaser some implied easement which was plainly neither contemplated nor intended to pass

(1) [1893] 2 Ch. 315.

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by the contract, then the machinery of the conveyance must be altered, and certain words of exception must be inserted in the conveyance which would carry out the true effect of the contract. That principle is the principle to be applied to this case. If the effect of the conveyance—say at 3 P.M. on September 29, 1919—would be to pass to the purchaser, not an estate in possession but an estate in reversion subject to the lease, which had some nine hours only to run, then it seems to me that the conveyance, taking effect at 3 P.M., might be framed so as to convey the property to the use of the vendor until midnight of September 29, and after that date to the use of the purchaser. At any rate machinery might be introduced to carry out the true terms of the contract. The purchaser is really seeking to look at the bare terms of the machinery of the contract—to carry out the contract so as to defeat its plain meaning. Looking at the matter broadly, it seems to me that the purchaser could not object to an arrangement under which, between the date of the contract and the date of the conveyance, the vendor had come to terms with the lessee, and have agreed with him to accept a surrender of the lease on September 27, 1919. If he had done that, as far as I can see there was nothing to prevent the vendor from conveying to the purchaser that which the purchaser had contracted for—namely, an estate in possession on September 29, 1919. The purchaser really says: "I am entitled under the contract, not to have an estate in possession, but to have an estate in reversion with only a very slight postponement of the possession—namely, for a few hours." It seems to me that the legal difference between possession and reversion is really a marked legal difference, although from the business point of view the difference may seem very slight.

So far I have dealt with the case on the conditions of sale themselves and on the general law; but I am glad to find that the decision I am giving is in accordance with the decision, in 1888, of North J. in *In re Edie and Brown's Contract.* (1) Some distinction was sought to be drawn on behalf of the

(1) 58 L. T. 307.

purchaser between the facts of that case and the facts of the case before me. There is one material fact which, on a certain view of that case, might have distinguished it, but I have to deal with the law of that case on the facts as found by North J., and on the facts as found by him that case appears to me to be precisely on all fours with the present case. North J. there held that a purchaser who was buying an estate in possession, the lease terminating on the day when the purchase was to be completed, got no such right as that which is claimed by the purchaser in the present case. Besides the weight of authority to be attached to the decision of that learned and extremely careful judge, it must be borne in mind that his decision is one with regard to contracts which are of a common character, connected with the sale and transfer of rights in land; that it has not been dissented from or commented on during the thirty years since it was pronounced; that it has become an accepted authority; and that it may have been treated as a guide by persons in making their contracts for giving possession on the day when a lease terminates without having regard to the few hours which may elapse between the time when the purchase would naturally be completed and the next midnight when the lease would, according to law, terminate.

In my judgment, the purchaser's claim to this sum of money is unfounded, and I dismiss his summons with costs.

F. E.

The purchaser appealed. The appeal was heard on February 17 and 18, 1920.

Maugham K.C., *Rolt K.C.* and *C. Farwell* for the appellant. It is submitted that as from the date of the contract the purchaser became the owner in equity of the property, and that as from that date the vendor was entitled to no benefit from it except what he had contracted to retain. The sum paid for dilapidations was in the nature of a windfall to which the purchaser became entitled as equitable owner of the property from the date of the contract. Under the contract the purchaser was entitled to the property in possession on

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September 29, and on completion became entitled to all improvements and benefits which had accrued to it since the date of the contract, except such as had been specifically reserved by the vendor. The lessee was bound to repair under his covenant and the vendor had no right to alter that obligation after the date of the contract. If the purchaser had known that the vendor was making a bargain with the lessee he could have obtained an injunction to restrain him from carrying it out. If the vendor desired to reserve the right to arrange with the lessee for the amount of the dilapidations and to retain the amount he ought to have done so in the conditions of sale. As from the date of the contract he was pro tanto a trustee of the property for the purchaser: *Shaw* v. *Foster* (1); *Phillips* v. *Silvester* (2); *Earl of Egmont* v. *Smith* (3); Dart on Vendors and Purchasers, 7th ed., pp. 287, 288, 290; Williams on Vendor and Purchaser, 2nd ed., pp. 49, 504 et seq. The purchaser bought the property subject to a lease which was to come to an end on the same day as that fixed for completion. If the arrangement with the tenant had not been carried out at the date of the completion of the contract the purchaser could have compelled the vendor to lend his name to sue the tenant. By reason of the vendor having received the compensation from the tenant the purchaser has not obtained all he contracted to purchase: *Clarke* v. *Ramuz.*(4) *In re Edie and Brown's Contract* (5) was relied on by Sargant J., but the actual decision there does not touch the present case. The judgment, although right, is not put on strict equitable grounds. It is difficult to understand some of the judge's remarks as to the sum claimed being incident to the reversion. The real question here is, Can this sum paid for dilapidations be regarded as part of the rents and profits which the vendor reserved by condition 4? *Rayner* v. *Preston* (6) exactly illustrates the present argument. There the vendor had effected an insurance on the property sold and in the interval between the date of the contract and the date

(1) L. R. 5 H. L. 321, 338.
(2) L. R. 8 Ch. 173, 176.
(3) (1877) 6 Ch. D. 469, 475.
(4) [1891] 2 Q. B. 456.
(5) 58 L. T. 307; [1888] W. N. 20.
(6) 18 Ch. D. 1.

of the completion, part of it was destroyed by fire, and it was held that the purchaser, who was unaware of the existence of the insurance, was not entitled to the insurance moneys.

[WARRINGTON L.J. It is the same question. What did the purchaser buy ?]

The purchaser here bought property which was in reversion until the date of completion. He became equitable owner of the reversion as from the date of the completion.

[YOUNGER L.J. As far as I can see at present the lease was an external thing altogether.]

In *Rayner* v. *Preston* (1) Cotton L.J. based his judgment on the policy of insurance in that case, being something collateral to the contract, and the reason why the vendor was allowed to retain the policy moneys was because the purchaser did not get them by reason of any legal interest he had in the land. See also the judgment of Brett L.J.

[WARRINGTON L.J. There was nothing novel in the decision in *Rayner* v. *Preston.* (1) It merely followed the law as laid down in the text-books.]

It is not proposed to go into the subtlety of the few hours intervening between the completion of the contract and the expiration of the lease which was relied on in the Court below. The contract here must be construed like any other document according to the words used. Under condition 4 it is only "rents and profits" that are to be retained by the vendor and these do not include the sum in question.

In re Edie and Brown's Contract (2) is not cited either in Dart on Vendors and Purchasers or Williams on Vendor and Purchaser or Fry on Specific Performance.

Romer K.C. and *Sheldon* for the respondent were not called upon.

LORD STERNDALE M.R. I think this appeal fails. It arises out of the sale of a house at Roehampton the particulars of which describe it as an attractive old-fashioned freehold residence, give particulars of the accommodation contained

(1) 18 Ch. D. 1, 5, 10. (2) 58 L. T. 307.

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in it and at the end state, "Let on lease expiring 29th September, 1919, at a rent of 500*l.* per annum, and to be sold with possession on completion of the purchase." Condition 3 states that "the remainder"—that is, the remainder after the deposit has been paid—"of the purchase-money shall be paid on the 29th day of September next at the office . . . . of the vendor's solicitors, at which time and place the purchase shall be completed." Condition 4 states [His Lordship read the condition and continued:] The house had been in military occupation, and as was to be expected had been a good deal damaged. That was stated by the auctioneer at the time. He said, that although as a matter of fact the purchaser lived opposite the property and must have known its condition entirely, he thought it fair that all purchasers should be warned that the place had been most cruelly treated by soldiers in occupation, but that the damage was mostly superficial, and by a reasonable expenditure the place could be restored to its old beauty. He stated in his affidavit that he had reduced the reserve which he had advised the vendor to put on the property from 10,000*l.* to 9000*l.* because of the state in which it was. That would not of course be known to the persons who were attending the auction, but the fact that the property was likely to sell for less because of the state it was in would be known to anybody who saw the condition it was in and heard what the auctioneer said. This lease which is referred to of course had the ordinary repairing covenants, and the lessee was liable to the vendor upon those covenants for the damage which had been done to the property by the military. The purchaser was the highest bidder and the contract was made on July 8, 1919. On August 22, 1919, the vendor and the lessee came to an agreement by which 2060*l.* was to be paid for the damage that had been occasioned to the property. That is claimed by the purchaser and it has been placed in joint names to abide the result of the action. Sargant J. has decided that it does not belong to the purchaser, and the fact that it does so belong is supported by a contention that after the contract of July 8 the vendor became trustee for the purchaser of, amongst other things, this money. The

vendor does not deny that he became trustee for the purchaser of anything that the purchaser bought, but he says that he did not become trustee for him of anything that he did not buy, and that neither directly nor by implication did he in any way buy this remedy which the vendor had against the lessee. The question is stated I think very clearly by Sargant J. in his judgment. After speaking of the proposition that the vendor after the contract is trustee for the purchaser, he says: "'The vendor does not dispute that general proposition, but says, 'What was it that was sold? It was not the house subject to and with the benefit of the lease which was existing at the date of the contract, but it was the house with possession, altogether apart from and independent of the lease, the obligations and rights under which were simply and solely a matter between the vendor and the lessee.'" I do not think the question could be put more plainly, and I adopt those words as a statement. Now what was it that was sold? I have already read the particulars and conditions which show that what the purchaser bought was the property with possession on completion of the purchase, and that although the lease was mentioned in the particulars it was only with the view of showing that it came to an end upon the day fixed for completion. I think that the result of that is simply what the particulars say—namely, that the purchaser bought the house with possession on September 29, and that he did not buy anything connected with the lease at all. I do not think it necessary to go through the reasoning gone through by Sargant J. to support that conclusion. I agree with it and I see no necessity for repeating it, but I am gratified to see that the opinion which I have formed on the matter is supported also by the judgment of North J. in *In re Edie and Brown's Contract.* (1)

Another point argued before Sargant J. was as to the effect of the completion taking place some time before midnight on September 29. That has not been urged before us, and I say no more about it. I think the judgment of Sargant J. was right and the appeal must be dismissed with costs.

(1) 58 L. T. 307; [1888] W. N. 20.

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WARRINGTON L.J. I am of the same opinion. What we have to deal with is a claim by the purchaser of a house to money received by the vendor from the lessee after the date of the contract in composition for his claim as lessor for damages for breach of a covenant to repair contained in the lease. The question, in my opinion, is what was the subject-matter of the contract. Was it a reversion, that is to say, an estate in the land subject to but with the benefit of an existing lease, or was it an estate in fee simple in possession? If it was the former then it may be conceivable that from the date of the contract the benefit of the lease would be held by the vendor as trustee for the purchaser; if it was the latter then the purchaser never had an interest at all by virtue of the contract or otherwise in the lease or in the lessee's covenants contained in it. In my opinion what the purchaser bought in this case was an estate in fee simple in possession and nothing else. The contract is for the sale of a house stated in the particulars to be let on a lease expiring on September 29, 1919, which was the day fixed for completion, at a rent of 500*l.* per annum, with possession on completion of the purchase. Pausing there for one moment, I should have thought that it is quite clear that what the purchaser was buying was an estate in fee simple to be conveyed to him as such on the day fixed for completion, that is September 29, 1919, and that the vendor would have no right to convey to him a reversion and the purchaser would have no right to require the vendor to convey to him a reversion. But the matter does not rest there. Condition 4 of the conditions of sale seems to me strongly to confirm the view which, on the particulars alone, I should have taken as to the real meaning of this contract. It is an extremely carefully drawn condition and one which is appropriate to the sale of an estate in possession and not to an estate in reversion. The condition is this [His Lordship read the condition and continued:] That condition means that if the purchaser does not complete on September 29 he is not to have actual possession. The point of the condition is that so far as the lease mentioned in the particulars is concerned the vendor is to receive the rents and profits. When the lease

comes to an end and the property is to be conveyed to the purchaser, there is no lease, all the purchaser is to have is the fee simple in possession. It seems to me that that clearly shows that it was not intended that the purchaser should take subject to or with the benefit of the then subsisting lease which was to expire at the time he was to have possession. I think that the purchaser in the present case bought an estate in fee simple in possession and nothing else; that he was never entitled to the benefit of any of the covenants contained in the lease; and that consequently the judgment of Sargant J. is correct and the 2060*l.* in question belongs to the vendor. I would only add that I feel with the Master of the Rolls great satisfaction in knowing that the view I have expressed is the same as that expressed by North J. in *In re Edie and Brown's Contract* (1), a case which in my judgment is absolutely on all fours with the present and incapable even of the most subtle distinction. I think the appeal fails and must be dismissed.

YOUNGER L.J. I am of the same opinion. I think that upon its true construction this was a contract for the sale of a house, with its grounds, for an estate in fee simple in possession as from the date fixed for completion of the contract—namely, September 29, 1919. There was included in the sale, in my opinion, no interest in any covenant contained in the then subsisting lease, which was not in any way agreed to be sold. The rights as between the vendor and purchaser under this contract with reference to the property comprised in it were the same neither more nor less that they would have been if there had been no lease at all. I agree with the judgments pronounced by my Lord and the Lord Justice.

Appeal dismissed.

Solicitors for appellant: *Hutchison & Cuff.*
Solicitors for respondent: *Walters & Co.*

(1) 58 L. T. 307; [1888] W. N. 20.

W. I. C.

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WARRINGTON L.J. I am of the same opinion. What we have to deal with is a claim by the purchaser of a house to money received by the vendor from the lessee after the date of the contract in composition for his claim as lessor for damages for breach of a covenant to repair contained in the lease. The question, in my opinion, is what was the subject-matter of the contract. Was it a reversion, that is to say, an estate in the land subject to but with the benefit of an existing lease, or was it an estate in fee simple in possession? If it was the former then it may be conceivable that from the date of the contract the benefit of the lease would be held by the vendor as trustee for the purchaser; if it was the latter then the purchaser never had an interest at all by virtue of the contract or otherwise in the lease or in the lessee's covenants contained in it. In my opinion what the purchaser bought in this case was an estate in fee simple in possession and nothing else. The contract is for the sale of a house stated in the particulars to be let on a lease expiring on September 29, 1919, which was the day fixed for completion, at a rent of 500*l.* per annum, with possession on completion of the purchase. Pausing there for one moment, I should have thought that it is quite clear that what the purchaser was buying was an estate in fee simple to be conveyed to him as such on the day fixed for completion, that is September 29, 1919, and that the vendor would have no right to convey to him a reversion and the purchaser would have no right to require the vendor to convey to him a reversion. But the matter does not rest there. Condition 4 of the conditions of sale seems to me strongly to confirm the view which, on the particulars alone, I should have taken as to the real meaning of this contract. It is an extremely carefully drawn condition and one which is appropriate to the sale of an estate in possession and not to an estate in reversion. The condition is this [His Lordship read the condition and continued:] That condition means that if the purchaser does not complete on September 29 he is not to have actual possession. The point of the condition is that so far as the lease mentioned in the particulars is concerned the vendor is to receive the rents and profits. When the lease

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Appeal dismissed.

Solicitors for appellant: *Hutchison & Cuff.*
Solicitors for respondent: *Walters & Co.*

(1) 58 L. T. 307; [1888] W. N. 20.

W. I. C.

P. O. LAWRENCE J. 1920 BICK, *In re.* EDWARDS *v.* BUSH.

W. Earengey for parties in the same interest referred to Theobald on Wills, 7th ed., p. 170.

W. Vernon in reply.

P. O. LAWRENCE J. This summons raises a question of some difficulty under s. 23 of the Wills Act, 1837. The testator by his will specifically devised a ground rent of 15*l.* a year on No. 15 Rotunda Terrace to his daughter absolutely. At the date of his will he owned a freehold rentcharge of 15*l.* per annum issuing out of the house, and I hold that the specific devise of the ground rent is a gift of this rentcharge. After the date of his will the testator acquired the fee simple of the house and by the conveyance to him the rentcharge was expressly merged. The only consideration for the conveyance was the amount of the arrears of the rentcharge that were then due. The question is whether by virtue of s. 23 of the Wills Act the ademption of the devise of the rentcharge, which otherwise took place on the purchase of the house, is saved and the house passes to the devisee of the rentcharge. Sect. 23 enacts that no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death. I agree with the statement in Theobald on Wills, 7th ed., p. 170, that the effect of the section is merely to repeal the old law under which a change of interest in itself revoked a gift, and to leave the Court free to construe the will in such a way as to carry out the testator's intention. Under the old law prior to the Wills Act there are numerous cases in which a gift has been held to be adeemed owing to a change of interest. Take, for instance, the renewal of a lease for a fresh term. Before the Act, if a testator specifically bequeathed leaseholds and afterwards surrendered the lease and took a fresh lease of the same property, the gift was adeemed, but now s. 23

makes the will operate and take effect upon the changed interest under the fresh lease. I was at first inclined to think that the present case might fairly be said to come within s. 23; but on reflection I think that the sound view is that the section does not apply. The subject-matter of the devise (namely, the freehold rentcharge) was an incorporeal hereditament belonging to the testator in fee simple. The freehold estate in the house which the testator subsequently acquired cannot in my opinion be fairly described as an estate or interest in the subject-matter of the gift within the meaning of s. 23.

For all practical purposes the present case is the converse of *In re Clowes* (1), and I think the principle of the decision in that case covers this case. There the testator specifically devised a freehold estate and afterwards sold the estate and took from the purchaser a mortgage on the property for part of the purchase-money, and it was held that the devisee was not entitled to the mortgage debt. Now here the testator devised a freehold rentcharge in which he had an estate in fee simple, but at the date of his will he had no estate in the house out of which it issued. In one sense no doubt he had an interest in the house because of his remedies to enforce payment of the rentcharge. This interest is not very unlike that of a mortgagee except that it is not so large, since a mortgagee has an estate in the mortgaged property, whereas the owner of a rentcharge has no estate in the property out of which it issues. The difference between a rentcharge and the property out of which it issues in my opinion is at least as great as the difference between a mortgage debt and the property upon which it is secured. When the testator acquired the fee simple of the house the rentcharge became altogether extinguished, and in my judgment there remained no estate or interest therein to which the section could apply. I therefore hold that there has been an ademption of the devise of the rentcharge and that the devisee takes no estate or interest in the house.

Solicitors: *Smiles & Co., for Steel & Broom, Cheltenham; Finnis, Downey & Co.*

(1) [1893] 1 Ch. 214.

H. L. F.

EVE J.

1920

Jan. 15, 16 ;
Feb. 6.

In re HARCOURT.

FITZWILLIAM *v.* PORTMAN.

[1919. H. 2557.]

Will—Settled Estate—Shifting Clause—Construction—Tenants for Life taking Concurrently or Successively—Context—General Scheme of Settlement.

Under the limitations of the will of a testatrix made in 1872 H. B. P. was equitable tenant for life in possession of the B. Park estate, but under a shifting clause in the will the trusts of this estate thereby declared for his benefit and for the benefit of his issue male and female ceased on his succeeding to the Barony of P., as if he were dead without issue of his body, and thenceforward the estate was to go and be in trust for such person or persons as by virtue of the limitations in the will would then be entitled next in remainder to the estate in case the person succeeding to the Barony were then dead without issue of his body :—

Held, following *Carr* v. *Earl of Erroll* (1805) 6 East, 58, that the person or persons entitled next in remainder took identical estates therein to those given to them by the limitations to which the shifting clause referred.

By the limitations of the will the B. Park estate was devised to trustees in fee upon trust to pay the rents to the niece of the testatrix for life, and after her death in trust for the first or only son of her niece, born in the lifetime of the testatrix, who should not, at the decease of her niece, be entitled in possession or in remainder to the Barony of P., during the life of such son, and after his death in trust for his first and every other son severally and successively according to seniority in tail, with remainder in trust for his first and every other daughter severally and successively according to seniority in tail, with remainder in trust for every other son of her niece born in the lifetime of the testatrix, other than a son for the time being entitled to the Barony, and the issue of every such son, so that every such son should take an estate for his life, with remainder to his first and every other son severally and successively according to seniority in tail, with remainder to his first and every other daughter severally and successively according to seniority in tail, with remainders over to the first and every other son and daughter of a sister of the testatrix for the same estates and in the same order, with remainder over and an ultimate remainder for her own right heirs. In 1877 the testatrix died and in 1880 the B. Park estate passed to her niece for life. She died in 1899, leaving her husband H. B., the second Baron P., and five sons. The eldest having died without issue the second son, H. B. P., succeeded to the B. park estate for his life, and on his becoming entitled to the Barony on October 16, 1919, the B. Park estate went over under the shifting clause to the person or persons entitled next in remainder under the limitations of the will.

Held, that upon the true construction of the limitations, in the event which had happened, the three younger brothers of H. B. P. born in the lifetime of the testatrix and living on October 16, 1919, took the B. Park estate successively and in remainder one after another and not concurrently and as a class.

Cradock v. *Cradock* (1858) 4 Jur. (N. S.) 626 applied.

Surtees v. *Surtees* (1871) L. R. 12 Eq. 400 distinguished.

By her will, dated May 23, 1872, Lady Catherine Julia Harcourt appointed devised and bequeathed the Buxted Park estate (subject to the life interest therein of her husband) to John Cotes and Francis John Savile Foljambe, their heirs and assigns, "upon trust that they, or the survivor of them, or the heirs of such survivor, do and shall pay the rents and annual proceeds thereof unto my niece Mary Selina Charlotte, the wife of the Honourable William Henry Berkeley Portman, the eldest son of Lord Portman, during the life of my said niece for her sole and separate use, without impeachment of waste, and from and after her decease in trust for the first or only son of my said niece born in my lifetime who shall not, at the decease of my said niece, be entitled in possession or in remainder immediately expectant on the decease of the survivor of the said Lord Portman and William Henry Berkeley Portman, to their family Barony of Portman, during the life of such son, without impeachment of waste, and from and after his decease in trust for his first and every other son severally and successively according to seniority in tail, with remainder in trust for his first and every other daughter severally and successively according to seniority in tail with remainder in trust for every other son of my said niece born in my lifetime, other than a son for the time being entitled in possession or in remainder immediately expectant on the decease of the survivor of the said Lord Portman and William Henry Berkeley Portman to the said Barony, and the issue of every such son so that every such son may take an estate for his life without impeachment of waste with remainder to his first and every other son severally and successively according to seniority in tail, with remainder to his first and every other daughter severally and successively according to seniority in tail, with remainder in trust for the first and every other son of my

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sister, Selina Charlotte, Viscountess Milton, born in my lifetime, and the issue of every such son, for the same estates and in the same order as are hereinbefore provided as to the sons born in my lifetime of my said niece, with remainder in trust for the first and every other son, born after my decease, of my said sister, severally and successively, according to seniority, with remainder in trust for the first and every other daughter of my said sister Viscountess Milton born in my lifetime, other than my said niece, and their respective issue for the same estates and in the same order as are hereinbefore provided as to the sons born in my lifetime of my said niece, with remainder in trust for the first and every other daughter born after my decease of my said sister Viscountess Milton, severally and successively, according to seniority in tail male, with remainder in trust for my own right heirs." The will also contained the following shifting clause: "Provided always and I hereby declare that if any son or remoter male issue of my said niece who by virtue of the limitations herein contained shall be or become entitled in possession to the said estate and hereditaments, shall become entitled in possession to the said Barony, then the trust hereby declared for the benefit of the son or remoter issue becoming entitled in possession to the said Barony and of his issue male and female shall cease and determine as if he were dead without issue of his body, and then and thenceforth the said hereditaments shall go and be in trust for such person or persons as by virtue of the limitations herein contained would then be entitled as the person or persons next in remainder to the same hereditaments, in case such son or remoter issue so becoming entitled to the said Baron were then dead without issue of his body."

The testatrix died in 1877, without having had any issue, and her husband died in 1880. The Buxted Park estate then passed to Mary Selina Charlotte, the niece of the testatrix and wife of William Henry Berkeley, the second Baron Portman, for her life. She died on January 3, 1899, leaving her husband and five sons. The eldest, Edward William Berkeley Portman, died in 1911 without leaving male issue. The second son was the Berkeley Portman (who subsequently

became the third Baron Portman). The other three sons, Claude Berkeley Portman, Seymour Berkeley Portman and Gerald B. Portman, were defendants to the action, all of them having been born in the lifetime of the testatrix.

On the death of Mary Selina, Baroness Portman, her second son, Henry Berkeley Portman, succeeded to the Buxted Park estate for his life under the appointment in the will and the shifting clause. The second Baron Portman died on October 16, 1919, and was succeeded in the Barony by his second son, Henry Berkeley, third Baron Portman, and thereupon the Buxted Park estate, by virtue of the shifting clause, went over so as to be held in trust for such person or persons next in remainder as should then be entitled in case the person entitled to the Barony were then dead without issue of his body.

The plaintiffs, the Honourable William Henry Wentworth Fitzwilliam, and Edwin Wilfred Stanyforth, were the present trustees of the will of Lady Catherine Julia Harcourt, and took out a summons asking :—

(1.) Whether, under the shifting clause contained in the will and in the event which had happened of the succession of the Right Honourable Henry Berkeley, third Baron Portman, to the Barony of Portman, the person or persons entitled next in remainder under the limitations or trusts of the said will to the Buxted Park estate took identical estates therein and in all capital moneys and investments now held upon the like trusts to those which were given to them respectively by the limitations or trusts to which the shifting clause referred.

(2.) Whether, on the true construction of the limitations or trusts to which the shifting clause referred, the defendants, C. B. Portman, S. B. Portman, and G. B. Portman, and their respective issue, took the Buxted Park estate and capital moneys successively or concurrently, that was to say, whether, on the succession of Henry Berkeley Baron Portman, his next brother, the defendant C. B. Portman, became entitled for his life to the entirety of the Buxted Park estate and capital moneys, with remainder to his first and every other son severally and successively according to seniority in tail, with remainder to his first and every other daughter severally and

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successively according to seniority in tail, with remainders over, or whether, on the happening of the said event, the estate and capital moneys passed in equal third shares to or in trust for the defendants C. B. Portman, S. B. Portman, and G. B. Portman for their respective lives, each of them taking one equal undivided share thereof for his life, with remainder to his first and every other son severally and successively according to seniority in tail, with remainder to his first and every other daughter severally and successively according to seniority in tail. The eldest son of C. B. Portman and the infant son of G. B. Portman were also defendants to the action.

H. T. Method for the trustees of the will.

F. Whinney for the first two defendants, C. B. Portman and his eldest son. The first defendant is now, as I submit, tenant for life of the whole Buxted Park estate, the shifting clause having come into operation upon his elder brother becoming entitled to the Barony. The estates taken are identical with the limitations or trusts to which the shifting clause applies: *Carr* v. *Earl of Erroll.* (1) The effect of the shifting clause is to accelerate the estate.

Upon the second question as to the construction of the limitations and trusts declared by the will, I submit that the three younger sons of the testatrix' niece take severally and successively according to seniority and not concurrently as tenants in common. On the actual words of the settlement without the context and the subsequent limitations, it might well be held that they would take concurrently as tenants in common their equal one-third shares for life respectively, with remainder to the first and every other son of each of them severally and successively. But that would be entirely out of keeping with the rest of the settlement, and there is authority for saying that an intention to give successive interests all through may be gathered from the context of the settlement: *Cradock* v. *Cradock* (2), *Honywood* v. *Honywood* (3); *Lewis* v. *Waters.* (4)

(1) 6 East, 58, 64.
(2) 4 Jur. (N. S.) 626.
(3) (1903) 89 L. T. 235, 378.
(4) (1805) 6 East, 336.

The terms of the limitations in these cases are not quite similar to those in the present case, but the principle of those decisions has been accepted by conveyancers ever since. The case of *De Windt* v. *de Windt* (1) was distinguished by Byrne J. in *Honywood* v. *Honywood* (2), and so was *Surtees* v. *Surtees*. (3) In the latter no doubt the terms of the settlement are somewhat similar to those in the present case.

J. W. F. Beaumont for the last three defendants, one being the infant son of G. B. Portman. So far as S. B. Portman and G. B. Portman are concerned they would prefer the estate going as a whole, but on behalf of the infant defendant I rely on *Surtees* v. *Surtees* (3) in support of the three younger sons of the testatrix' niece taking concurrently as tenants in common.

Cur. adv. vult.

Feb. 6. EVE J. The will of the testatrix gives rise to two questions of construction consequent upon the succession on October 16, 1919, of Henry Berkeley Portman to the Barony of Portman.

At the date mentioned Henry Berkeley Portman was under the limitations contained in the will of the testatrix equitable tenant for life in possession of the hereditaments and premises known as the Buxted Park estate, but under a shifting clause contained in the will the trusts of this estate thereby declared for his benefit and for the benefit of his issue, male and female, ceased and determined on his succeeding to the Barony as if he were dead without issue of his body and then and thenceforth the said estate was to go and be in trust for such person or persons as, by virtue of the limitations in the said will contained, would then be entitled as the person or persons next in remainder to the said estate in case the said Henry Berkeley Portman were then dead without issue of his body.

To the first question raised whether under this clause the person or persons entitled next in remainder to the said hereditaments and premises take identical estates therein and in all capital moneys and investments held upon the like trusts

(1) (1866) L. R. 1 H. L. 87. (2) 89 L. T. 235, 378.
(3) L. R. 12 Eq. 400.

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to those given to them respectively by the limitations or trusts to which the shifting clause refers, the answer is, in my opinion, in the affirmative. The case is governed by *Carr* v. *Earl of Erroll* (1), and is clearly distinguishable from *Lambarde* v. *Peach* (2), where the shifting clause provided that the limitations made in favour of the pluralist were to determine as if he were dead, but did not direct that the estate should go over to the next in remainder as if he were dead. In the present case the original gifts take effect accelerated by the avoiding of the preceding limitations under the proviso.

The second question raises the point whether, upon the true construction of the limitations taking effect in the event which has happened, the testatrix intended the three younger brothers of Henry Berkeley Portman, born in her lifetime and living on October 16, 1919, to take as a class or in succession, that is to say, were they all three to take concurrently at once and as a class, or were they to take successively and in remainder one after another ?

Reading the limitation apart from the context and without the assistance of the authorities I think the sons would take collectively as tenants in common for life and not successively : *Surtees* v. *Surtees* (3), but it is not possible to contemplate imposing this construction upon the limitation in this will without realizing that it involves a dealing with the property different from that provided for by the other limitations and inconsistent with the obvious intention of the testatrix, that the Buxted Park estate should be retained and enjoyed in its entirety.

The limitation on which the question arises relates only to sons of the niece born during the lifetime of the testatrix. It does not extend, as was the case in *Surtees* v. *Surtees* (3), to after-born sons. These are dealt with in the next limitation, and they are to take " severally and successively " according to seniority in tail with remainder " in trust for every daughter born in my lifetime of my said niece and the issue of every such daughter for the same estates and in the same order as

(1) 6 East, 58. (2) (1859) 4 Drew. 553.
(3) L. R. 12 Eq. 400.

are hereinbefore provided with respect to the sons of my said niece born in my lifetime and their respective issue, with remainder in trust for the first and every other daughter born after my decease of my said niece severally and successively according to seniority in tail." Then there follows a very important and illuminating remainder in trust "for the first and every other son" of the testatrix's sister Viscountess Milton "born in my lifetime and the issue of every such son for the same estates and in the same order as are hereinbefore provided as to the sons born in my lifetime of my said niece." And a little further on this phraseology is repeated in the remainder in trust "for the first and every other daughter" of her said sister "born in her lifetime."

Now the limitations to or in trust for "the first and every other son" and "the first and every other daughter" respectively born of the Viscountess Milton in the lifetime of the testatrix, notwithstanding the absence of any words of succession, import that the sons and daughters are to take successively according to priority of birth: *Lewis* v. *Waters* (1), and when the testatrix in each case goes on to say that they and their issue are to take "for the same estates and in the same order as are hereinbefore provided as to the sons born in my lifetime of my said niece" I think it would be doing violence to the general scheme of the will to construe the particular limitation I am here considering as conferring concurrent and not successive estates on the three younger sons of the niece.

In *Cradock* v. *Cradock* (2), where the limitation in remainder was "to the third and all and every other the son and sons of the body of A. and the heirs male of such son and sons," Stuart V.-C. treated the difficulty occasioned by the absence of words of succession as removed by the decision in *Lewis* v. *Waters* (1), and held that the third and other sons took successively and in remainder one after another.

It is true that the language with which I have to deal is not that either of *Lewis* v. *Waters* (1) or *Cradock* v.

(1) 6 East, 336. (2) 4 Jur. (N. S.) 626.

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Cradock (1), but on the other hand it is not that of *Surtees* v. *Surtees.* (2) It may be said to be something between the two latter, and it is, I think, the context in which I find the clause which justifies me in applying to its construction the following passage from the Vice-Chancellor's judgment in *Cradock* v. *Cradock.* (1) After deciding that the limitation there was governed by *Lewis* v. *Waters* (3), he proceeded to say that "there was another view of the case which supported the construction contended for by those who said that the third son and every other son was to take in succession, and that was this—it was a construction which gave a meaning and an effect to every word of the language which the testator had used; and the language of the testator which gave the estate to all and every other the son and sons was as much answered by giving to all in succession as in any other way. But there was another rule of construction more important, perhaps, than any other, and it was in favour of the view that the third and the other son or sons should be held to take successively. That rule was this, that if in a will there be found a consistent scheme provided by the testator for the distribution of his property, anything doubtful in the language which he had used must be construed so as to make it consistent with the general scheme of the will." I think the reasoning of the Vice-Chancellor can properly be applied to the construction of this will, and I hold, therefore, that the younger sons take successively and not concurrently.

Solicitors, *Rawle, Johnstone & Co.; Greenfield & Cracknall; Wilde, Moore & Co.*

(1) 4 Jur. (N. S.) 626. (2) L. R. 12 Eq. 400.
(3) 6 East, 336.

G. M.

In re GARDNER.

HUEY *v.* CUNNINGTON.

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1920
February 24.

[1919. G. 1593.]

Will—Construction—Life Estate to Husband "knowing that he will carry out my wishes"—Subsequent unattested Memorandum—No enforceable Trust—Intestacy.

Where the existence of a trust appears on the face of a will but not the terms, those claiming under it must establish that the terms of the trust had been known and their effect communicated to the legatee at or before the execution of the will.

A testatrix bequeathed all her real and personal estate to her husband for his use and benefit during his life, "knowing that he will carry out my wishes," and four days after the date of her will signed an unattested memorandum expressing her wishes that the money she left to her husband should, on his death, be equally divided among certain named beneficiaries:—

Held, that, assuming the subject-matter of the gift to the husband comprised the undisposed-of capital, and was not confined to his life interest therein, there was no enforceable trust created in favour of the beneficiaries named in the memorandum, inasmuch as it had not been proved that the wishes of the testatrix had been known and communicated to the husband at or before the execution of the will.

Johnson v. *Ball* (1851) 5 De. G. & Sm. 85 followed.

Held, therefore, that the residue of the estate passed to the husband and, in the event which had happened of his death intestate, devolved upon his statutory next of kin.

By her will, dated April 23, 1909, Elfrida Gardner gave and bequeathed all her real and personal estate of every description to her husband, Herbert Gardner, for his use and benefit during his life, "knowing that he will carry out my wishes"; and she appointed her husband sole executor of her will. The testatrix died on April 9, 1919, possessed only of personal estate of the value of 3500*l.* Herbert Gardner survived his wife only a few days and died on April 14, 1919, leaving no children or the descendant of any child, and he did not prove her will. By his will dated July 19, 1916, Herbert Gardner appointed the plaintiffs, Isaac M. Huey and Ellen Sidney Whitlock, executors and trustees, and, after making certain

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pecuniary and specific bequests, purported, in alleged pursuance of a testamentary power of appointment which he did not possess, to appoint three sums of 1000*l.* to Mabel Olive Hope Bayly, May Cunnington, and Lancelot Brodrick respectively; and he gave his residuary personal estate to his wife, Elfrida Gardner, absolutely. By a second codicil he appointed the third plaintiff, Lewis William Taylor, to be an additional executor and trustee of his will and codicils. The plaintiffs duly proved the will and codicils on June 4, 1919.

On August 9, 1919, letters of administration with the will annexed of Elfrida Gardner were granted to the plaintiffs. Soon after the testatrix's decease the plaintiff, L. W. Taylor, found her will in her husband's safe, and with it an unwitnessed paper dated April 27, 1909, and signed by Elfrida Gardner, containing these words: "My wishes are that the money I leave to my husband should, on his death, be equally divided among my nieces and nephew, viz., May Cunnington, Mabel Olive Hope Bayly, and Lancelot Brodrick. In the event of May Cunnington not surviving my husband then the money to be divided between M. O. H. Bayly and L. Brodrick in equal parts."

M. O. H. Bayly died on October 9, 1917. Questions having arisen on the construction of the will of the testatrix and the effect of the memorandum, the plaintiffs, as legal personal representatives of the testatrix, took out an originating summons asking whether the bequest of her residuary estate to her husband for life knowing that he would carry out her wishes created a trust in favour of the surviving niece and nephew, or whether Herbert Gardner became absolutely entitled to his wife's undisposed-of residuary estate. M. Cunnington and L. Brodrick were made defendants, and the third defendant, Austen Gardner, represented the next of kin of Herbert Gardner.

One of the plaintiffs, Ellen Sidney Whitlock, widow, in her affidavit stated that early in the year 1909 Mrs. E. Gardner told her one day in the presence of Herbert Gardner that her property after her husband's death was to be divided between her two nieces and nephew—namely, the defendant

M. Cunnington, M. O. H. Bayly and the defendant L. Brodrick, and that Herbert Gardner signified his assent.

H. T. Method, for the plaintiffs.

C. J. W. Farwell for the surviving niece and nephew. I submit that a valid trust of the capital of the testatrix' property has been created by virtue of the memorandum. In terms the testatrix only gives a life interest to her husband, but she must be taken to have known that he would succeed to the capital at her death, and intended that her wishes expressed in the memorandum should apply to all her real and personal estate. The memorandum of wishes is dated after the date of the will, but the evidence of Mrs. Whitlock establishes that the husband knew of his wife's wishes and assented to them. Silence is sufficient assent, and knowledge may well be inferred in this case from the relation of the parties. Otherwise, there is an intestacy as to the capital. It is settled by the authorities that when it is a case of a secret trust, not appearing on the face of a will, it is immaterial when the trust is communicated to the legatee, as it would be a fraud on his part to accept the gift for himself. In *McCormick* v. *Grogan* (1) the jurisdiction is founded on personal fraud. So in *French* v. *French*. (2) *In re Fleetwood* (3) has been doubted, but never overruled. Other cases in which similar trusts have been enforced are *In re Maddock* (4) and *Moss* v. *Cooper*. (5) A case against my contention is *In re Hetley* (6), where a gift for life with a direction to dispose of estate according to verbally expressed wishes was held void for uncertainty.

The requisites for establishing a good trust are set forth in *In re Gardom*. (7) This case was reversed on appeal on the question of the sufficiency of the evidence but the law was not questioned. It is submitted that the requisites for a valid trust have been sufficiently satisfied in the present case.

C. D. Myles for the next of kin of the husband. Where on the face of the will the legatee does not take the entire

(1) (1869) L. R. 4 H. L. 82, 88.
(2) [1902] 1 I. R. 172, 230.
(3) (1880) 15 Ch. D. 594.
(4) [1902] 2 Ch. 220.
(5) (1861) 1 J. & H. 352.
(6) [1902] 2 Ch. 866.
(7) [1914] 1 Ch. 662, 669; [1915] W. N. 216; 113 L. T. 475.

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interest beneficially the communication of the terms of the trust to him prior to or contemporaneously with the will is necessary to establish the trust. That has not been done here as the memorandum of wishes was made four days after the date of the will, and the trust is therefore bad. Where the trust does not appear on the face of the will and operates only on the conscience of the legatee the same considerations do not apply. *In re Fleetwood* (1) is still law, and *Johnson* v. *Ball* (2) governs this case. It was approved of by Joyce J. in *In re Hetley.* (3) The admissibility of parol evidence in cases of this character is discussed in *In re Gardom.* (4)

Farwell in reply.

EVE J. [after stating the facts, reading the gift in the will, and the memorandum of April 27, 1909, continued :] The question is whether under the combined effect of the will and memorandum any trust was created in favour of the surviving niece and nephew, or whether the husband became absolutely entitled to his wife's undisposed-of residuary estate. The first question is, what is the construction of this memorandum ? Do the wishes therein expressed relate to the undisposed-of estate or are they confined to the interest which the testatrix created therein in favour of her husband ? The subject-matter dealt with by the memorandum is referred to as " the money I leave to my husband," and if one turns to the will the only money which can properly be described as money left by the testatrix to her husband is the life interest. But Mr. Farwell has argued that she must be assumed to have known that her husband would take the capital after her death jure mariti, and that when she speaks of " the money I leave to my husband " she means the money which is left to him by reason of her not having otherwise disposed of it. I feel great difficulty in attaching that meaning to the language employed. I think when the testatrix speaks of the money she is leaving to her husband—whether she so intended it or not I am quite unable to say—she must be taken to be referring to something

(1) 15 Ch. D. 594.
(2) 5 De G. & Sm. 85.
(3) [1902] 2 Ch. 866.
(4) [1914] 1 Ch. 662, 669.

which was the subject-matter of a testamentary gift to her husband and not to an interest which he would take by virtue of a partial intestacy.

On this construction the memorandum is inoperative, as there was nothing left on the husband's death to which the trust could attach. But inasmuch as this construction leads to an absurdity it may be that another tribunal might so construe the document as to make it refer to all the real and personal estate bequeathed to the husband for his use and benefit during his life, and I propose, therefore, to deal with the matter upon the footing that this is the right construction, and that in effect she has stated: "I wish my real and personal estate, the life interest in which I have left to my husband, and the capital of which I am well aware that he will succeed to on my death, to be dealt with in the following manner." Upon that construction the next question is whether there is a trust which I can enforce in favour of the persons mentioned in this document. This is a case in which, on the face of the will, there is a statement showing that the legatee is not to take the entire interest beneficially; on the hypothesis upon which I am proceeding, he is entitled to a life interest but not to the capital; that is to be dealt with according to the wishes of the testatrix. In such a case is it permissible to ascertain the trust by recourse to materials coming into existence subsequent to the execution of the will? I think it is clear upon the authorities that where there is no notice of any trust appearing on the face of the will, and where the trust is only imposed on the legatee because it would be fraudulent on his part to accept the gift without discharging the obligation to dispose of it according to the donor's intentions, it is quite immaterial at what stage the testator communicates to the legatee the trust imposed upon him: see per Lord Davey in *French* v. *French* (1) and the observations of Cozens-Hardy L.J. in *In re Maddock.* (2) But does the same rule apply in a case where the existence of a trust appears on the face of the will? I think not. In such a case those claiming under the trust must establish that the trust had been ascertained and

(1) [1902] 1 I. R. 230. (2) [1902] 2 Ch. 220, 231.

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its terms disclosed and communicated to the legatee at or before the execution of the will. The testator cannot make a gift to be held upon trusts thereafter to be defined by an instrument not executed as a will. I think this is clear from the judgment in *Johnson* v. *Ball.* (1) There the bequest was to named individuals of a policy " to hold the same upon the uses appointed by letter signed by them and me." No such letter was in fact signed when the will was executed, but the legatees had been previously asked by the testator and had consented to accept the bequest for the benefit of persons and objects then named by the testator. Between the dates of his will and his death the testator signed an unattested memorandum declaring the trusts on which the trustees were to hold the policy. The Vice-Chancellor, in dismissing a claim by one of the persons beneficially interested under the memorandum, held that the testator could not prospectively create for himself a power to dispose of property by an instrument not duly executed as a will, and that the trustees held the proceeds of the policy in trust for the residuary legatees. " Cases in which there is no trust appearing on the will, and where the Court establishes a trust on the confession of the legatee, have no application to the present; nor, as it appears to me, have those cases cited in the argument, in which the will refers to a trust created by the testator by communication with the legatee antecedently to or contemporaneously with the will."

I am loth to refer to a decision of my own—more particularly as it is one in which the Court of Appeal came to a different conclusion on the facts; but in *In re Gardom* (2) this question was elaborately argued, and I state the conclusion at which I arrived in cases where a trust appears on the face of the will and where persons claiming as beneficiaries seek to establish the trust by parol evidence; such evidence must at least establish that the testatrix at the time of making her will had determined the particular manner in which the residue was to be disposed of, and had communicated her determination to the legatees at or before the making of the will. To that

(1) 5 De G. & Sm. 85, 91. (2) [1914] 1 Ch. 662, 669.

opinion I still adhere, and I think it is in accord with the earlier case to which I have just referred.

In the present case it is quite possible, nay probable, that the testatrix had, at the date of her will, communicated to her husband what her wishes were, but there is no evidence to show that she had done so, and, so far as it goes, this document tends to negative the existence of any prior declaration of her wishes. It reads a little as though it were the first expression of her wishes. It is dated four days only after her will, but whether it is four days or four months seems to me to be immaterial when once it is established that a testator cannot bequeath his estate, or any part of it, upon trusts thereafter to be expressed by parol, or in a writing not executed as a will. The wishes must be known and their effect communicated to the legatee at or before the execution of the will. There is no evidence that such was the case here and accordingly I must hold that the residue of the estate passed to the husband, and in the event which has happened of his death intestate it has devolved on the persons now entitled as his statutory next of kin. The costs will come out of the residue of the husband's estate.

Solicitors: *Burgess, Taylor & Tryon; Norman Orfeur, for Cunnington, Son & Orfeur, Braintree; Ernest W. Essell, for C. A. Gardner, Canterbury.*

G. M.

EVE J.
1920
Feb. 19, 25.

In re THOMSON'S MORTGAGE TRUSTS. THOMSON *v.* BRUTY.

[1919. T. 1038.]

Mortgage—Sale by First Mortgagee—Surplus Proceeds of Sale—Claim by Second Mortgagee—More than Six Years' Arrears of Interest—Real Property Limitation Act, 1833 (3 *&* 4 *Wm.* 4, *c.* 27), *s.* 42—*Conveyancing and Law of Property Act,* 1881 (44 *&* 45 *Vict. c.* 41), *s.* 21, *sub-s.* 3, *and s.* 22.

A first mortgagee who has sold the mortgaged property under his statutory power of sale is under a statutory obligation by virtue of s. 21, sub-s. 3, and s. 22, of the Conveyancing and Law of Property Act, 1881, to hand the surplus proceeds remaining after his claim as first mortgagee has been satisfied to the second mortgagee or other the person entitled to the mortgaged property and authorized to give a receipt for the proceeds of sale thereof. He is not entitled to retain the surplus proceeds and assert on behalf of a third mortgagee or the mortgagor a right to be paid the whole surplus after payment to the second mortgagee of the principal moneys owing on the second mortgage and six years' arrears of interest only.

A summons by a second mortgagee against the first mortgagee and other persons interested in the surplus proceeds of sale to have it determined whether he is entitled to repayment of the principal moneys owing on the second mortgage and all arrears of interest and costs, and to obtain payment accordingly, is in substance an action by a beneficiary for execution of the trusts of the surplus proceeds and is not an "action or suit" for the recovery of "interest in respect of . . . . money charged upon or payable out of . . . . land" within s. 42 of the Real Property Limitation Act, 1833.

ADJOURNED SUMMONS.

On January 23, 1905, Edward David Thomson mortgaged his freehold farm known as Brickhouse Farm, South Fambridge, Essex, by successive legal mortgages ranking one after the other to secure sums of 900*l.*, 200*l.*, 300*l.* and 350*l.* respectively and interest. The first mortgage was to William Ward Duffield and the defendant William John Bruty jointly, the second to Helen Thomson, the third to Thomas William Offin, and the fourth to Helen Thomson.

By deed dated October 22, 1909, Helen Thomson submortgaged the principal sum of 200*l.* owing on the second mortgage and the security for the same to the plaintiff James George Wood to secure a loan of 100*l.* to Edward David

Thomson, the mortgagor, who entered into a personal covenant for repayment of the sum. On April 15, 1912, Thomas William Offin submortgaged (amongst other things) the principal sum of 300*l.* owing on the third mortgage and the security for the same to William Ward Duffield and the defendant Bruty to secure a loan to him of 2431*l.* and interest.

Helen Thomson died on May 4, 1916, and the plaintiffs other than the plaintiff Wood were her executors. No interest had ever been paid on the second mortgage but the interest on the sub-mortgage to the plaintiff Wood had been paid down to April 22, 1918. Thomas William Offin died in 1916 and two of the defendants were the executors of his will. William Ward Duffield died in 1918.

In November, 1918, the defendant Bruty sold Brickhouse Farm for 1500*l.* under the statutory power of sale conferred by the first mortgage, and after payment of all principal interest and costs in respect of the first mortgage there remained a balance of nearly 500*l.* in his hands. A correspondence then took place between the plaintiffs' solicitors and the defendant Bruty's solicitors in which the plaintiffs claimed to be entitled out of the balance in the defendant's hands to the principal money, all arrears of interest and costs in respect of the second mortgage, and the defendant's solicitors contended that the plaintiffs were only entitled to the principal money, six years' arrears of interest and costs.

In these circumstances the plaintiffs issued this summons for the determination of the question whether the balance of the proceeds of sale was held by the defendant Bruty upon trust to pay thereout in priority to all other claims to the plaintiff Wood, as the person entitled to give a receipt for the same under the submortgage to him, the amount due for principal, interest and costs under the second mortgage on the footing that such interest must be computed from January 23, 1905, or on any other and what footing; and they asked for payment accordingly.

J. K. Young for the plaintiffs. By the general law a

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mortgagee who has sold the mortgaged property and repaid himself is trustee of the surplus proceeds of sale for the persons entitled to it: *Charles* v. *Jones.* (1) Further, he is by statute a trustee for the second mortgagee when, as here, he has realized the mortgaged property under the statutory power of sale: Conveyancing and Law of Property Act, 1881, s. 21, sub-s. 3, and s. 22. In such a case the first mortgagee's duty is to pay the second mortgagee the amount to which he is entitled and that is the principal sum, all arrears of interest and costs. It may be that certain remedies are not open to the second mortgagee by virtue of the Real Property Limitation Act, 1833, s. 42, but the second mortgagee's title to the whole arrears of interest is unextinguished and the trust on which the first mortgagee holds the surplus proceeds of sale is to pay the full amount owing and not merely the part of it that is recoverable. Thus a mortgagee who has the proceeds of sale in his own hands is entitled to pay himself all arrears of interest and it is the same if the money is in Court: *In re Lloyd.* (2) Thus, if the mortgagee's contention here were correct, he could pay the second mortgagee his principal moneys with only six years' arrears of interest and then as submortgagee of the third mortgage pay himself the principal moneys and arrears of interest in full. The plaintiffs are not debarred from recovering all interest in arrears, for they are not seeking to recover it in any action or suit but simply asking for the execution of the trusts on which the first mortgagee holds the surplus proceeds.

P. F. Wheeler for the third mortgagee. It is true that the first mortgagee holds the surplus proceeds of sale in trust, but a trustee is bound to set up the Statutes of Limitation against any claim against the trust estate if any of the beneficiaries call upon him to do so: *In re Wenham* (3); *In re Stead's Mortgaged Estates.* (4) The comment on the latter case by Stirling L.J. in *In re Lloyd* (5) is not sufficient to deprive it of authority. The summons brought by the

(1) (1887) 35 Ch. D. 544.
(2) [1903] 1 Ch. 385.
(3) [1892] 3 Ch. 59.
(4) (1876) 2 Ch. D. 713.
(5) [1903] 1 Ch. 404.

plaintiffs is an action or suit within s. 42 of the Act of 1833, and on these proceedings the third mortgagee is entitled to insist that the first mortgagee shall set up the statute. It is well settled that the plaintiff mortgagee in a foreclosure action can on a sale being ordered get only six years' arrears of interest.

A. M. Begg for the defendant Bruty as submortgagee of the third mortgage. The originating summons is an action or proceeding under s. 42 of the Act of 1833 : see *In re Fawsitt.* (1) Here the summons asks for payment of the arrears of interest and it is therefore an action or a suit for the recovery of interest in respect of money charged upon land within the section. Further, a trustee of an insufficient fund, such as the first mortgagee is here, should only pay claims legally maintainable : *Ex parte Dewdney* (2) ; *In re Fleetwood and District Electric Light and Power Syndicate.* (3)

J. K. Young in reply. The duty of a trustee to set up the statute against a claim that is statute barred does not apply when the claimant is a cestui que trust : see Lightwood on the Time Limit on Actions, pp. 211-213. *In re Stead's Mortgaged Estates* (4) is distinguishable. There the sale was under the Lands Clauses Consolidation Act, so that the proceeds of sale were treated as being still land and the Court there was dealing with s. 40 and not s. 42 of the Real Property Limitation Act, 1833.

Cur. adv. vult.

Feb. 25. EVE J. delivered the following written judgment: On January 23, 1905, one Edward David Thomson raised a sum of 1750*l.* on the security of a freehold farm in Essex by four legal mortgages ranking one after the other for 900*l.*, 200*l.*, 300*l.* and 350*l.* respectively. In 1918 the defendant Bruty, the survivor of the lenders on joint account of the 900*l.*, sold the property under his statutory power, and after satisfying his claims as first mortgagee, he has in hand a balance of rather less than 500*l.* available for the subsequent incumbrancers.

(1) (1885) 30 Ch. D. 231.
(2) (1809) 15 Ves. 479, 497.
(3) [1915] 1 Ch. 486.
(4) 2 Ch. D. 713.

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The two first plaintiffs are the legal personal representatives of the second mortgagee; the plaintiff Wood is a sub-mortgagee of their mortgage. No interest was ever paid on the second mortgage and there is owing on that security the principal sum of 200*l.*, and interest for twenty years at 5 per cent. No question under the Statute of Limitations arises as, for one thing, there was a sufficient acknowledgment of the debt when the sub-mortgage to Wood was executed in 1909. The defendants Offin and Moss are the legal personal representatives of the third mortgagee. Bruty is an assignee of this mortgage by way of sub-mortgage to secure a sum largely in excess of the amount owing on the mortgage; he is, therefore, for all practical purposes in the position of the third mortgagee.

In these circumstances Bruty, who does not dispute that he is a trustee of the surplus proceeds for the subsequent incumbrancers, refused to pay to the plaintiffs more than six years' arrears of interest on the 200*l.*, relying in support of his refusal on the Real Property Limitation Act, 1833, s. 42. With this amount the plaintiffs refused to be satisfied and on October 30 last, after various attempts to obtain payment of interest for the whole period of the mortgage, they issued this summons, whereby they ask for the determination of the question, whether the balance in Bruty's hands is held upon trust to pay thereout in the first place, and in priority to all other claims thereon to the plaintiff Wood, as the person entitled to give a receipt for the same under the sub-mortgage, the amount due for principal, interest and costs under the second mortgage on the footing that such interest is to be computed as from the date of the mortgage down to the date of payment, or on any other and what footing, and for consequential relief.

On the summons coming on to be heard all the defendants contend that this is an action or suit by the plaintiffs for the recovery of interest in respect of money charged upon land, and that by s. 42 of the Real Property Limitation Act, 1833, six years' interest only can be recovered. The defendant Bruty does not suggest that he holds the balance otherwise

than as first mortgagee, but he argues that as his co-defendants insist that he shall not pay any more than six years' interest to the plaintiffs, he is bound to retain the fund and leave the plaintiffs to take proceedings against him to recover, if they can, more than the six years' interest.

I do not think this attitude of the defendant Bruty can be justified. I think he is and always has been since his claims as first mortgagee were satisfied under a statutory obligation to pay the surplus to the plaintiff Wood as the person then entitled to the mortgaged property and authorized to give a receipt for the proceeds of sale thereof: see Conveyancing and Law of Property Act, 1881, s. 21, sub-s. 3, and s. 22. Bruty had not, in my opinion, any right as a satisfied prior incumbrancer to retain the surplus proceeds as against Wood, and in retaining them he has really been asserting on behalf of the mortgagor and those claiming under him by title subsequent to the plaintiffs' title a right as against the plaintiffs to have paid to them the whole surplus after deducting principal and six years' arrears of interest only. If the fund were in Court and the mortgagor or the defendants applied for payment out on this footing, it is I think clear from what was said by the Court of Appeal in *In re Lloyd* (1) that the application would not be successful even though the mortgagees against whom the application was made had never had in their hands the proceeds of sale of the mortgaged property. Is the position of the defendants strengthened by the fact that the fund is not in Court but has remained throughout in Bruty's hands, or are the plaintiffs prejudiced by the fact that it is they and not the defendants who come to ask for payment of the fund to them ? I think not. Bruty's possession, in the view I take of the statutory obligation which arose on his prior claims being satisfied, must be treated as the possession of the person rightfully entitled to have the fund handed to him, that is, the plaintiff Wood, and on this footing this application is no more to be treated as an action to recover interest within

(1) [1903] 1 Ch. 385, 403.

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the meaning of s. 42, than was the position for payment out in *Edmunds* v. *Waugh.* (1)

But assuming that my view of the construction to be placed on the Conveyancing and Law of Property Act is not sound and that Bruty, as has been argued, is a trustee of the fund for all subsequent incumbrancers, he is not in my opinion entitled in the execution of the trusts mero motu, or at the instigation of any one or more of his cestuis que trust to withhold from any cestui que trust a fund, his title to which is unextinguished though his right to recover it by action may be barred. The position is fundamentally different by reason of the existence of the relationship of trustee and cestui que trust from that of an executor or liquidator who may be required by a residuary legatee or other party interested in the estate or even by another creditor, to set up the statute as an answer to a claim founded on a debt already barred. The duty of the trustee is to ascertain the parties entitled to the trust fund, the shares of the fund to which they are respectively entitled and to distribute the fund accordingly : it is no part of his duty when a cestui que trust has proved his title to a share of the fund to retain the share and require the cestui que trust to institute proceedings to recover it. Still less can such an attitude be justified in a case like the present where it is to the personal interest of the trustee to withhold payment.

The question remains whether, assuming Bruty to be a trustee for all the incumbrancers, this application is an action or suit within the meaning of s. 42. I do not think it is : it is in substance an action by a beneficiary for the execution of the trust, and although due execution will involve payment of all the arrears of interest to the beneficiary, this result is brought about by the nature of the trust, not by any order to be made in these proceedings. Reliance was placed by the defendants on the decision in *In re Stead's Mortgaged Estates.* (2) I am uncertain how far that decision ought to be followed since the judgment in *In re Lloyd* (3), but

(1) (1866) L. R. 1 Eq. 418. (2) 2 Ch. D. 713.
(3) [1903] 1 Ch. 404.

treating it as a binding authority in circumstances similar to those there existing, that is to say, a compulsory sale of land subject to an equitable mortgage, payment into Court by the purchaser of the price and an application by the mortgagee for payment out, I do not think it has any bearing on the facts with which I have to deal in this case.

What I propose to do is to declare that, subject to the payment thereout of his costs of this summons to be taxed as between solicitor and client, the defendant Bruty holds the surplus proceeds of sale and any interest thereon upon trust to pay the same to the plaintiff Wood. I direct taxation of the plaintiffs' costs of the summons as between party and party and direct the amount certified to be added to their security. No good purpose can be served by directing taxation of any further costs, but I give liberty to apply as to this and generally.

Solicitors: *Faithfull, Owen, Blair & Wright; Duffield, Bruty & Co.*

H. C. G.

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[1919. T. 1197.]

Will—Devise without Words of Limitation—Gift over at Death of Devisee "without an heir"—Gift over to possible collateral Heir—Heir of the Body—Estate Tail—Estate in Fee Simple with executory Gift over—Wills Act, 1837 (1 *Vict. c.* 26), *ss.* 28, 29.

In a will made since the Wills Act a devise of lands to A. and "at his death without an heir" to A.'s nephew must be construed as giving A. an estate in fee simple in the lands subject to an executory limitation over at his death if he should die without leaving an heir of the body.

Parker v. *Birks* (1854) 1 K. & J. 156 applied.

The reasoning of Joyce J. in *In re Leach* [1912] 2 Ch. 422 adopted.

ADJOURNED SUMMONS.

By her will dated May 27, 1914, Margaret Ann Thomas

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after appointing executors and trustees of her will and making certain specific and pecuniary devises continued: "I give and bequeath my farm and lands known as Trevor in the parish of Llansadwrn to the Honourable Walter Vivian and at his death without an heir to Captain Anthony Vivian of Plasgwyn and his heirs." The testatrix died on January 4, 1919, without having revoked or altered her will which was duly proved by the executors named in the will. The plaintiff was the Honourable Walter Vivian and the defendant was Captain Anthony Vivian who was the plaintiff's nephew.

This summons was taken out by the plaintiff asking that it might be declared that under the above devise the plaintiff took an estate in fee simple, or if not an estate tail in possession with remainder to the defendant or otherwise that the true construction of the devise might be determined.

Clayton K.C. and *A. L. Ellis* for the plaintiff. The fact that the defendant is a possible collateral heir cuts down the meaning of the word "heir" from heir general to heir of the body, because otherwise the gift over would be repugnant to the original devise: *Webb* v. *Hearing* (1); *Harris* v. *Davis*. (2) It follows that the plaintiff takes an estate tail: *In re Waugh*. (3) There are cases where the first devise is construed as a gift in fee simple with an executory gift over in the event of the first devisee dying without issue, but this is because by s. 29 of the Wills Act the failure of issue is not treated as indefinite but is ascertained at the moment of death. That section has no application to a gift over at the death of a devisee without an heir.

G. T. Simonds for the defendant. The plaintiff takes an estate in fee simple with an executory gift over to the defendant if the plaintiff dies without an heir of the body. It is admitted that the gift over must be construed as taking place at the plaintiff's death without an heir of the body. The words "at his death" prevent the importing of an

(1) (1619) Cro. Jac. 415. (2) (1844) 1 Coll. 416, 422.
(3) [1903] 1 Ch. 744.

indefinite failure of issue. There is no case since the Wills Act in which in such circumstances an estate tail has been raised by implication. Before then a gift to A. without more gave a life interest only and the Court was accordingly astute to imply a larger estate. Now by s. 28 of the Wills Act the gift to the plaintiff without words of limitation passes an estate in fee simple and there is no need for any implication: see Williams on Real Property, 20th ed., p. 247; Jarman on Wills, 6th ed., vol. i., p. 658; and Hawkins on Wills, 2nd ed., p. 246. *In re Leach* (1) is directly in point here for, although the gift over in that case was to take place on failure of issue so that s. 29 of the Wills Act applied and prevented its being construed as meaning an indefinite failure of issue, the words of the gift over here indicate that the failure of an heir of the body is to be ascertained at the death of the first devisee. *Webb* v. *Hearing* (2) was decided before the Wills Act, and in *In re Waugh* (3) the word "heirs" occurred in the limitation of the first devise. When once, therefore, it was held to mean heirs of the body the gift was reduced to an estate tail. Here there is no question of construing the words of limitation. *Crumpe* v. *Crumpe* (4) was decided on very special words in the will and is no authority against the defendant's contention.

Clayton K.C. in reply. In *In re Waugh* (3) the estate in fee simple given to the first devisee was restricted by virtue of the gift over: see Jarman on Wills, 6th ed., vol ii., p. 1854. Further, s. 29 of the Wills Act applies only to a gift over on failure of "issue" and has no application here. It is an indefinite failure of heirs of the body that is contemplated and the first devisee therefore takes only an estate tail.

[*G. T. Simonds* referred to *Parker* v. *Birks*. (5)]

The estate of the first devisee is cut down to an estate tail if the gift over contemplates an indefinite failure of issue.

(1) [1912] 2 Ch. 422.
(2) Cro. Jac. 415.
(3) [1903] 1 Ch. 744.
(4) [1900] A. C. 127.
(5) 1 K. & J. 156.

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That is so here, inasmuch as s. 29 of the Wills Act has no application: see *Dawson* v. *Small.* (1)

EVE J. By her will dated in 1914 the testatrix devised her farm and lands known as Trevor in the following words: "I give and bequeath my farm and lands known as Trevor in the Parish of Llansadwrn to the Honourable Walter Vivian and at his death without an heir to Captain Anthony Vivian of Plasgwyn and his heirs." The question I have to determine is what estate the plaintiff, Walter Vivian, takes in the property. On his behalf it is suggested that he takes an estate tail in possession; on behalf of the defendant, Anthony Vivian, it is argued that the plaintiff takes an estate in fee simple subject to an executory limitation over to the defendant on the happening of the contingency mentioned in the will. The will having been made since the Wills Act the devise without any words of limitation confers by virtue of s. 28 an estate in fee simple, and the first devise must therefore be read as a devise to the plaintiff his heirs and assigns. The subsequent limitation is to a person capable of being a collateral heir of the first devisee, and it therefore becomes necessary to attribute to the gift over some meaning which will enable it to take effect. This is done by construing the word "heir" as meaning heir of the body. This rule is well established and is stated in Hawkins on Wills, 2nd ed., p. 217, in the following terms: "If real estate be devised to B. on failure of heirs of A., and B. is capable of being heir to A., the word 'heirs' is construed to mean heirs of the body since otherwise the devise to B. could never come into operation." The rule applies to the present case, as the defendant is capable of being the heir of the plaintiff, and I must accordingly construe the words "without an heir" as equivalent to "without an heir of the body," so that in substance the devise must be read as a devise to the plaintiff his heirs and assigns with a gift over at his death without an heir of the body to the defendant.

(1) (1874) L. R. 9 Ch. 651.

It is argued for the plaintiff that the effect of so construing the word "heir" in the gift over is to cut down the interest of the first devisee to an estate tail, in which case the defendant would take an estate in remainder on an estate tail. On the other side it is contended that the interest of the first devisee remains an estate in fee simple subject to an executory limitation over on the happening of the contingency of his death without leaving an heir of the body. It is admitted that, if the gift over was in terms to take effect on the death of the first devisee "without issue," it would by virtue of s. 29 of the Wills Act be construed to mean a failure of issue at the death of the first devisee and not an indefinite failure of issue, and that in that case the estate in fee would not be cut down to an estate tail; but it is argued that the section only applies in cases where death "without issue" or "without leaving issue" is referred to and does not extend to like gifts in terms of "heirs of the body" or "heirs." Prima facie it is urged these words mean an indefinite failure of heirs of the body or heirs. The real question to be decided comes therefore to this, Is this gift over to be construed as taking effect on an indefinite failure of heirs of the body of the first devisee or on a failure of heirs of the body at the time of the death of the first devisee? If an indefinite failure of heirs of the body is contemplated, then the first taker's interest must be construed as an estate tail; but if the failure of heirs of the body contemplated is a want or failure at the date of the death of the first devisee the estate in fee is not converted by the subsequent limitation into an estate tail. I have here the words "at his death without an heir," and I think the words "at his death" point to a punctum temporis at which it is to be ascertained once for all whether the contingency has happened on which the gift over is to take effect. The estate is not given over on an indefinite failure of heirs of the body but only if there is no heir of the body at the time of the first taker's death. There is therefore no ground for cutting down the interest of the first devisee to an estate tail.

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Applying *Parker* v. *Birks* (1) and greatly assisted by the reasoning of Joyce J. in *In re Leach* (2) I hold that on the true construction of this will the plaintiff takes an estate in fee subject to an executory devise over on his death if he should die without an heir of the body.

Solicitors: *Whitfield, Byrne & Dean for Carter, Vincent & Co., Bangor; Longbourne, Stevens & Powell.*

H. C. G.

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1920
March 5, 10.

MARSHALL *v.* CHARTERIS.

[1920. M. 206.]

Ejectment Action—Defendant in Possession—Receiver—Interlocutory Application—Jurisdiction—Discretion—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25.

Where the defendant in an ejectment action was in actual occupation of a house which was in dispute in the action, but was not in receipt of any rents and profits of the same, the Court refused, on an interlocutory application, to exercise its discretionary jurisdiction by appointing a receiver of the rents and profits of the house, and ordering the defendant to give up possession to the receiver.

John v. *John* [1898] 2 Ch. 573 distinguished.

MOTION.

By an agreement dated May 30, 1919, Edmund Butler Charteris, the husband of the present defendant, Lillian Clare Charteris, agreed to sell and the plaintiff, Margaret Marshall, agreed to purchase for 5000*l.* a leasehold messuage and premises, No. 12, John Street, Mayfair, in the county of London. The premises were held under a lease dated May 12, 1914, for thirty-two years from March 25, 1914, at the yearly rent of 68*l.*, and the purchase was to be completed on September 29, 1919. A deposit of 500*l.* was made. The vendor having neglected to complete the plaintiff, on October 22, 1919, commenced an action against him in the

(1) 1 K. & J. 156. (2) [1912] 2 Ch. 422.

Chancery Division for specific performance of the agreement of May 30, 1919, and damages.

The vendor entered an appearance but made default in delivering a statement of defence, and on December 16, 1919, the plaintiff moved for judgment. By an order made by Peterson J. on that day it was ordered that the agreement should be specifically performed, an inquiry was directed as to damages, and the vendor ordered to execute an assignment of the premises. On December 31 the vendor executed an assignment of the hereditaments and premises to the plaintiff for the residue of the term granted by the lease. The balance of the purchase-money was paid by the plaintiff on January 1, 1920, and the deeds relating to the property were handed over by the vendor. His wife, L. C. Charteris, remained in residence at the house and declined to give up possession when requested by the plaintiff's solicitors so to do. The defendant and her husband had been living apart since March 24, 1919.

On January 23, 1920, the present action was accordingly brought by the plaintiff against the defendant to establish the plaintiff's title to the leasehold house, No. 12, John Street, and for recovery of possession of the same, for a receiver and damages, for mesne profits, and the costs of the suit. Notice of motion was given on February 16, 1920, in which the plaintiff sought for the appointment of an interim receiver of the rents and profits of the premises, and that the defendant might be ordered to deliver up possession to the receiver within seven days from the date of the order, or that such other order might be made in the premises as might be just. The defendant had been residing at No. 12, John Street, since March 22, 1919.

By her affidavit sworn on February 25, 1920, the defendant stated that on March 24, 1919, she had an interview with her husband, who expressed his intention of leaving her, and without imputing any blame to her thought that they would be better apart, and further said that she could occupy the house as long as it was convenient to her.

On February 26, 1920, the defendant issued a third party

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notice against her husband, claiming to be indemnified by him against the claim in the action for damages, mesne profits, and costs, on the ground that he had deserted her on March 24, 1919.

Clayton K.C. and *A. C. Nesbitt* for the plaintiff. The Court has clear jurisdiction under the Judicature Act, 1873, to appoint a receiver on an interlocutory application in a case like the present: *Berry* v. *Keen* (1); *John* v. *John*. (2). It is in the discretion of the Court to exercise that jurisdiction, and it will do so here where there is prima facie no answer to the plaintiff's claim, and the defendant has shown no title upon which she is ever likely to succeed. She is also a married lady with no separate estate; and lastly, the plaintiff will have great difficulty in establishing any claim for damages for being kept out of possession against the husband of the defendant from whom she has taken an assignment of the lease and to whom she has paid the purchase-money. With regard to the alleged agreement between the husband and wife there has been no consideration for it; no tenancy exists, as mere continuance in possession is not enough, there must have been admission into possession unequivocally referable to a contract; and there has been no part performance to take the case out of the Statute of Frauds. On these points they referred to *Morphett* v. *Jones* (3); *Maddison* v. *Alderson* (4); *Hodson* v. *Heuland* (5); *Roberts* v. *Tregaskis* (6); and *Marshall* v. *Berridge*. (7) There was only a personal arrangement between the husband and wife for her temporary convenience.

Maugham K.C. and *Giveen* for the defendant. There is no precedent for an interim order for a receiver being made in an ejectment action in similar circumstances where the defendant is in actual occupation of the premises in dispute. The real meaning of this motion is to get judgment in the ejectment action on an interlocutory application. In

(1) (1882) 51 L. J. (Ch.) 912.
(2) [1898] 2 Ch. 573.
(3) (1818) 1 Swanst. 172.
(4) (1883) 8 App. Cas. 467.
(5) [1896] 2 Ch. 428.
(6) (1878) 38 L. T. 176.
(7) (1881) 19 Ch. D. 233.

Berry v. *Keen* (1), where a receiver was appointed, there was vacant possession, and in *John* v. *John* (2) the defendant was in receipt of the rents and profits of the whole property, but was not in actual occupation of any part of it. That differentiates those cases from the present, and it would be an altogether unusual exercise of the discretionary power of the Court to order the defendant here to deliver up possession to a receiver. The question of the Statute of Frauds and part performance of the agreement cannot be properly discussed on this application in the absence of pleadings and discovery. [They referred to *Biss* v. *Hygate* (3) and *Zimbler* v. *Abrahams*. (4)]

Dighton Pollock for the husband was not heard by the Court.

Clayton K.C. in reply referred to *Hawkes* v. *Holland* (5) and to *Ind, Coope & Co.* v. *Mee* (6), where an order for delivery up of possession had been made on an interlocutory application.

EVE J. This application, one of a very unusual character, is made in an action brought in the following circumstances. [His Lordship stated the facts and continued :] The action, commonly spoken of as an ejectment action, is one for the recovery of land, and if the procedure adopted by the plaintiff results in the order for which she asks, she will, in substance, be obtaining judgment in the action on this interlocutory motion. Several objections occur to me to such a course being adopted. It operates to the prejudice of the right of the defendant in possession to plead her possession as a statutory defence and thereby put the plaintiff to the proof of the paramount title upon which she relies ; it imposes on the defendant at a stage of the action before any pleading has been delivered the obligation of disclosing the title under which she claims and requires her to defend that title or at least to displace the plaintiff's title without the protection

(1) 51 L. J. (Ch.) 912.
(2) [1898] 2 Ch. 573.
(3) [1918] 2 K. B. 314.
(4) [1903] 1 K. B. 577.
(5) [1881] W. N. 128.
(6) [1895] W. N. 8.

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afforded in cases where the action comes on to be heard in the ordinary way after pleadings, and the other usual steps in the action, including discovery ;. finally it puts the Court in this difficulty, that the substantial issue in the action may, by this procedure, be determined in some degree upon evidence admissible on an interlocutory application but properly open to objection at the trial. These objections do not however touch the question of jurisdiction, they only emphasize the care with which the jurisdiction must be exercised. The observations with which Lord Russell of Killowen commences his judgment in *Foxwell* v. *Van Grutten* (1) show clearly that the jurisdiction exists. He says : "There is no question as to the jurisdiction of the Court to make such an order as that under appeal, for the twenty-fifth section of the Judicature Act of 1873 clearly empowers the Court to appoint a receiver where it is just or convenient that such an appointment should be made." And in *Berry* v. *Keen* (2) where there was vacant possession and *John* v. *John* (3) where the defendant was not in actual occupation of any part of the property, but was in receipt of the rents and profits of the whole, the jurisdiction was exercised and a receiver was in each case appointed on an interlocutory application. Here I have to deal with a case unlike either of those ; there is no vacant possession ; the defendant is in actual occupation of the premises in dispute, and is not otherwise in receipt of any rents and profits.

Ought I in such circumstances, brevi manu, on an interlocutory application, to exercise the discretionary jurisdiction by appointing a receiver and ordering the defendant to give up possession to him ?

Counsel for the plaintiff says I ought for several reasons. First, he says that on the evidence now before me the defendant has disclosed no title upon which she is ever likely to succeed in the action ; secondly, that she is a married lady without separate estate ; and thirdly, that having taken an assignment from the husband and paid the purchase price

(1) [1897] 1 Ch. 64, 68. (2) 51 L. J. (Ch.) 912.
(3) [1898] 2 Ch. 573, 578.

the plaintiff will have great difficulty in establishing any claim for damages against him for the loss to which she is put by being kept out of possession. I am willing to assume, without deciding anything on the points raised, that these contentions are in the main well founded, that there is nothing very satisfactory in the title disclosed by the defendant's evidence, that it is of a somewhat shadowy and unsatisfactory nature, that the lady not being possessed of separate estate is not a wholly satisfactory person with whom to litigate, and that no damages can be recovered from the husband if her conduct in remaining in possession turns out to be indefensible. The question is do these considerations warrant me in exercising this jurisdiction? No authority has been produced in which the Court has in similar circumstances made an order of this nature on an interlocutory application. In *John* v. *John* (1), to which I have already alluded and which is perhaps the strongest authority to be found in support of the plaintiff's arguments, there were circumstances which, I think, sufficiently distinguish it from this case to prevent its being of any great assistance to me. The defendant, as I have already mentioned, was not in actual possession of any part of the property. She was, however, in receipt of the rents and profits of the whole estate and was a person of limited means. The order appointing the receiver did not involve delivery up by the defendant of actual possession; in substance all it effected was the regular collection of the rents and profits and their preservation for the person ultimately adjudged entitled to them. This order was as much, or perhaps even more, for the protection of the tenants than for that of the plaintiff; had they paid their rents to the defendant and had it ultimately turned out that she had no title to the premises, they would have obtained no discharge for the rents so paid but would have been liable to pay them over again to the plaintiff. There was, therefore, in that case a class of persons outside the parties to the action whose interests the Court felt ought not to be disregarded, and whose safety from a

(1) [1898] 2 Ch. 573.

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pecuniary standpoint depended very materially on the defendant's prospect of success in the action and on her financial capacity.

These considerations contributed materially to the conclusion at which the Lords Justices arrived that the case was one for the exercise of the jurisdiction. Lindley M.R. says: "In considering each particular case we have first to look at the person in possession and consider how long he has been in possession, and whether he claims under any and what title; we must look also at all the other circumstances which may be material, and the risk to which the tenants may be exposed is one not to be lost sight of," and at the conclusion of his judgment, "Under those circumstances, believing in the title of the plaintiff, and not believing in the title of the defendant, and seeing that the rents are in jeopardy, it appears to me that it would be wrong to refuse a receiver." Chitty L.J. in assenting deals with the question of title and the position of the tenants exposed to the risk of a double claim and adds: "Those are the two main circumstances. The other is that the defendant is not in actual possession of any house, or mansion house, or other part of the property. She will not be turned out of actual possession, and she is a person living in furnished apartments and of small means, so that the rents if paid to her will be in danger of not being recovered from her if judgment at the trial should be given against her." I cannot treat that case as a precedent for what I am asked to do here—which is in substance to turn this lady out of the house and to give the plaintiff judgment in the action. I think it would require a much stronger case than the plaintiff has presented on this occasion to justify any such order, and in all the circumstances in the exercise of the discretion which is undoubtedly reposed in the Court I refuse this motion.

Solicitors: *Dalston, Sons & Elliman; Walbrook & Hosken; Charles Russell & Co.*

G. M.

In re BARKER'S SETTLEMENT.

KNOCKER *v.* VERNON JONES.

SARGANT J.

1919

Dec. 11, 12, 19.

Power—Power of Revocation and New Appointment—General Power—Expressly referring to Power—Exercise by Will—"Give devise and bequeath and appoint"—Sufficient Reference to Power.

Under a voluntary settlement made in 1881, a fund was settled upon trust for the testatrix for life with remainder, in the events which happened, in trust for other persons therein named. The settlement reserved a power for the testatrix with the consent of the trustees of the settlement by deed or will expressly referring to the power to revoke the trusts of the settlement, and to declare other trusts thereof for her own benefit. By deeds in 1906 and 1909 the testatrix, with the consent of the trustees, exercised her power of revoking the trusts as to two sums, parts of the settled fund, and appointed those sums in her own favour. She died in 1918, having made a will in 1914 without the consent of the trustees by which she gave devised bequeathed and appointed all her residuary estate, both real and personal, to trustees upon trust for sale and conversion and declared trusts of the proceeds thereof. She had no other power of appointment:—

Held, that on the true construction of the settlement the consent of the trustees was not required for the exercise of an appointment by will; that the words of the will were sufficient to effectuate the double process of revocation and new appointment; that they contained a sufficient express reference to the power within the language of the settlement, and that the remaining balance of the settled fund therefore passed under the appointment contained in the will.

Dictum of Turner L. J. in *Pomfret* v. *Perring* (1854) 5 D. M. & G. 775, 781, followed.

ADJOURNED SUMMONS.

By a voluntary settlement dated December 7, 1881, and made between Arabella Maria Barker of the one part and trustees of the other part, after a recital that the settlor had transferred a sum of 3,000*l.* India 4*l.* per cent. stock into the names of the trustees, it was declared that the trustees should stand possessed of that sum and the investments thereof (thereinafter called "the trust fund") upon trust to pay the income thereof to Arabella Maria Barker for her life and after her death to pay the income to any husband whom she might marry for his life with remainder in trust for her children as therein mentioned, and in default of children

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(which event happened) it was declared that the trustees should stand possessed of the trust fund upon trust to divide the same into two equal parts and to pay one of such parts to Frances Payne and to hold the other upon trust (after raising and paying thereout a sum of 200*l.*) to pay the income thereof to Emma Barker for her life, and after her decease upon trust for her children as therein mentioned. The settlement then contained the following proviso: "Provided always and it is hereby agreed and declared that it shall be lawful for the said Arabella Maria Barker at any time or times hereafter with the consent in writing of the trustees or trustee (which consent they or he shall have an absolute discretion to give or withhold without incurring any responsibility in that behalf) by any deed or deeds revocable or irrevocable or by will or codicil expressly referring to this power wholly or partially to revoke the trusts powers and provisions herein declared and contained of and concerning the premises hereby settled and the income thereof and to declare such new or other trusts of and concerning the same and any parts thereof for the benefit of herself the said Arabella Maria Barker her executors and administrators or any other person or persons as she may think fit."

By two separate deeds dated respectively August 29, 1906, and May 5, 1909, and made between Arabella Maria Barker (hereinafter called the testatrix) of the one part, and the trustees of the other part, the testatrix in exercise of the power for that purpose given to her by the settlement, and with the consent of the trustees thereby testified, revoked the trusts of the settlement declared concerning the sums of 1034*l.* and 800*l.* respectively parts of the settled trust fund, and with the like consent appointed that the trustees should stand possessed of the said sums of 1034*l.* and 800*l.* upon trust to purchase in the name and for the life of the testatrix certain annuities therein mentioned and to hold the residue of those sums in trust for the testatrix absolutely discharged from the trusts of the settlement.

The settled trust fund was by the appointments aforesaid reduced to the sum of 1200*l.* The testatrix made her will

dated August 6, 1914, whereby after appointing executors and trustees she gave devised and bequeathed certain articles of personal use or ornament and all the residue of her jewellery silver and plated goods and household furniture and effects amongst various relations and connections. The will then proceeded as follows : " I give devise bequeath and appoint to my said trustees all my estate both real and personal whatsoever and wheresoever not hereby otherwise disposed of upon trust as soon as conveniently may be after my decease to sell call in and convert the same into money and after payment of my just debts and funeral and testamentary expenses to pay the nett proceeds of such sale as to three hundred pounds to my nephew Charles Frederic Barker of the Marine Hotel Walton-on-the-Naze in the county of Essex Hotel keeper and as to all the residue thereof to pay the same to my nephew, Edward Dudley Cobham Payne."

The testatrix died a spinster on October 12, 1918. She had no other power of appointment than that reserved by the settlement and her property, apart from the settled trust fund, was of inconsiderable value. On September 18, 1919, administration with the will annexed was granted to Charles Frederic Barker, the executors named in the will having renounced probate.

Frances Payne died on February 17, 1909. Gertrude C. Vernon Jones was now her legal personal representative. Emma Barker died on December 31, 1914, leaving children.

This was an originating summons taken out by the surviving trustee of the settlement against Gertrude C. Vernon Jones (who was appointed to represent all the persons beneficially interested under the settlement in default of appointment by the testatrix) and Charles Frederic Barker as defendants, for the determination of the question whether the will of the testatrix operated as a revocation of the trusts declared of the fund at her death remaining subject to the settlement and as a new appointment of such fund, or whether the same was distributable in accordance with the trusts of the settlement.

S. Leeke for the trustee of the settlement.

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A. Grant K.C. and *Harman* for the legal presonal representative of the testatrix. First, the consent of the trustees was not required for an appointment by will; according to the grammatical construction of the settlement their consent is only required in the case of an appointment by deed; moreover such protection is sensible where the appointment is to take effect in the appointor's lifetime, but is not needed in the case of an appointment taking effect at death. Secondly, the power of revocation and new appointment given to the testatrix by the settlement was well exercised by her will; the words here are "and appoint" following after the words "I give devise and bequeath," and since there was no other property over which the testatrix had a power of appointment —evidence of which fact is admissible: *In re Mackenzie* (1)— the words "and appoint" are sufficient to effect the double process of revocation and appointment: *Pomfret* v. *Perring* (2), where Turner L.J. said that, if there was no power except one of revocation and new appointment, general words of appointment would then be held to be an exercise of that power. This case is covered by the principle of *In re Mayhew.* (3) Thirdly, the words "and appoint" sufficiently refer to the power in the settlement: *In re Waterhouse* (4); *In re Lane.* (5) The case is distinguishable from *Phillips* v. *Cayley* (6), where the testator did not refer to any power at all. [They also cited *Deg* v. *Deg* (7); *Kent* v. *Kent* (8); *In re Rolt.* (9)]

H. S. Howard for the beneficiaries under the settlement. I do not contest the first point—namely, that the consent of the trustees was not necessary to an appointment made by will. As regards the second and third points, in none of the cases cited were there present the two special features of the present case—namely, (1.) the power to revoke and make a new appointment, and (2.) the requirement of an express reference to the power. The power here is in the nature of a compound

(1) [1917] 2 Ch. 58.
(2) 5 D. M. G. 775, 781.
(3) [1901] 1 Ch. 677.
(4) (1907) 98 L. T. 30.
(5) [1908] 2 Ch. 581.
(6) (1889) 43 Ch. D. 222.
(7) (1727) 2 P. Wms. 412, 415.
(8) [1902] P. 108.
(9) [1908] W. N. 76.

power. It was necessary, in the first place, that the subsisting trusts of the settlement should be revoked; the settlement must be taken to have purposely required that the mode of exercising the power should be by revocation of the trusts and then by way of new appointment so as to insure that the exercise of the power should not be made unadvisedly. A power of revocation and new appointment cannot be exercised by general words of appointment such as those in the present case: Farwell on Powers, 3rd ed., p. 242. The dictum of Turner L.J. in *Pomfret* v. *Perring* (1) is relied on against me, but at the time of that dictum *In re Mayhew* (2) and that line of cases had not been decided. It is submitted that if the learned Lord Justice had been able to anticipate the construction which was afterwards given to the word "appoint" as an express reference to a power of appointment, the dictum would have been confined to words in less general terms. There is no sufficient express reference to the power within the meaning of the settlement. The word "appoint" is not enough: *In re Weston's Settlement.* (3).

A. Grant K.C. in reply.

Cur. adv. vult.

December 19. SARGANT J. read the following judgment: The question here is whether the will of the testatrix operated to exercise a power of revocation and new appointment contained in a previous settlement. The material facts are stated in an affidavit of the plaintiff trustee and may be summarised as follows. By a voluntary indenture dated December 7, 1881, the testatrix settled a sum of 3000*l.* India 4 per cent. stock upon trust to pay the income to herself for life, and after her death upon trust to pay the income to any husband during his life. She never married; and then there were trusts for children which, of course, did not take effect, and a gift over in default. And the settlement contains a power of revocation and new appointment in these words. His Lordship read it and continued:] On two occasions—

(1) 5 D. M. G. 775, 781. (2) [1901] 1 Ch. 677.
(3) [1906] 2 Ch. 620.

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namely, in the year 1906, and again in the year 1909—the testatrix with the consent of the trustees effected revocations and new appointments of parts of the trust funds, the object on each occasion being apparently to increase her income by the purchase of annuities on her own life. On the death of the testatrix, which occurred on October 12, 1918, there remained subject to the trusts of the settlement the sum of 1200*l.* only which was invested on mortgage and is probably not recoverable in full.

By her will dated August 6, 1914, the testatrix, after appointing executors and trustees, made a series of specific bequests to various relations and connections, the words of bequest being these—namely, "I give devise and bequeath," and the testatrix then proceeded as follows. [His Lordship read the residuary gift and continued :] The determination of the question in issue depends upon whether by the employment by the testatrix in the gift I have just read of the additional words "and appoint" she has effectually exercised her power of revocation and new appointment as to the funds remaining subject to the voluntary settlement.

In the first place it has to be considered whether on the true construction of the power itself the consent of the trustee is necessary to a revocation or new appointment, not only when it purports to be effected by a deed but also when it purports to be effected by will. On the first reading of the power the words "with the consent of the trustees" would seem to attach themselves more naturally to both branches of the power than to the first branch only. But the words can quite easily be read the other way. And when the substance of the provision is considered, it is fairly obvious that it is in this latter way that the words should be read. The object of the restrictions on the exercise of the power is clear —namely, that the lady should be protected against an ill-considered revocation which might stultify the protection otherwise given to her by the settlement ; and this protection is not required in the case of a document such as a will which operates only on her death. And, further, while it is quite common in practice that the efficacy of a deed should depend

on the consent in writing of persons other than an actual party to the deed such a requirement is most unusual in the case of a will (except under the law as it stood at the date of the settlement in the case of the consent of a husband to the will of his wife) and would be a very awkward requirement to comply with. I hold that under this clause a revocation and new appointment by will did not require for its effective operation any consent on the part of the trustees.

I have next to decide whether the words of gift in the will are sufficient to execute a power of revocation and new appointment. This is what is sometimes known as a one power case—that is a case where the testatrix had only one power of appointment. And it is clear, and indeed is conceded, that the words of the will would be sufficient in such a case to exercise a general power of appointment even apart from s. 27 of the Wills Act, or to exercise a special power of appointment: *In re Mayhew.* (1) But it has been strongly contended that they are not sufficient to exercise a power the exercise whereof requires in strictness a double process—namely, first revocation and next new appointment. In my opinion, however, this is not so. The words here are made singularly emphatic by the repetition of the word "and" instead of its mere transposition; the previous words of gift "I give devise and bequeath" are repeated in full, and then the words "and appoint" are added; the phraseology is almost as marked as if the added words had been "and I appoint." The language indicates clearly an intention to add to a gift of property belonging in full to the testatrix a gift of property over which she had a power of appointment. And there being no property of this kind except property over which she had a power of revocation and new appointment (a distinction fine in itself and hardly appreciable by a layman), she must have been referring to this property and this power. And this being established the words are sufficient to effectuate her double process of revocation and new appointment. My conclusion in this particular case has the great advantage of

(1) [1901] 1 Ch. 677.

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being in accordance with the general view expressed by Turner L.J. in *Pomfret* v. *Perring*. (1)

The last and most difficult question is whether the words of the will "expressly refer" to the power within the language of the settlement. In general no doubt the words are primarily intended to exclude the operation of s. 27 of the Wills Act, and this is probably their main meaning here, though they are really unnecessary in the case of a power of revocation and new appointment: *In re Wells' Trusts*. (2) But the effect of the words may go beyond their main object, and their precise meaning must therefore be carefully examined. Now in the first place it has been held that such words do not require a specific reference to the particular power since they can be satisfied by words showing intention to exercise any or every power: *In re Waterhouse*. (3) And I do not think they can be read as meaning "accurately" refer, or "definitely" or "generally" refer. The word "expressly" seems to me in such a phrase to be contrasted as usual with "impliedly," and to mean that the reference has to be an expressed reference, that is, a reference appearing from the expressions used in the subsequent instrument. Here the additional words "and appoint" are part of the expressions or express words used in the will; and if I am correct in my previous view that they are sufficient to point to and exercise this power of revocation and new appointment apart from the special requirement of an express reference thereto, it seems to me to follow almost necessarily that they do also satisfy this special requirement.

A similar construction has been placed by Lord St. Leonards on what constitutes an "express trust" for the purposes of the Statute of Limitations: *Commissioners of Donations* v. *Wybrants*. (4) Again the question of what is an "express" variation of a general statute by an incorporating Act has been similarly dealt with in *Metropolitan District Ry. Co.* v. *Sharpe*. (5) And reference may also be made to the decision in *Denney*

(1) 5 D. M. & G. 775, 781.
(2) (1889) 42 Ch. D. 646.
(3) 98 L. T. 30.
(4) (1845) 2 J. & Lat. 182.
(5) (1880) 5 App. Cas. 425; 50 L. J. (Q. B.) 14.

v. *Conklin* (1), as to what constitutes "express notice in writing" within s. 25, sub-s. 6, of the Judicature Act, 1873.

In the result the question raised by the summons must be answered in the affirmative.

Solicitors: *Trotter & Patteson, for Stenning, Knocker & Thompson, Tonbridge; Torr & Co., for Wilson & Nicholson, Walton-on-the-Naze.*

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A. C.

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[1918. P. 1440.]

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Poor Law—Officer of Union—Superannuation—Joint Appointment—Death—Vacation of Office—Service for "not less than twenty years"—Aggregation of Services under different Unions—Poor Law Officers' Superannuation Act, 1896 (59 & 60 *Vict. c.* 50), *ss.* 2, 4, 8.

For the purpose of computing the service entitling the holder of a joint appointment on its vacation to a superannuation allowance under the Poor Law Officers' Superannuation Act, 1896, the words "served for not less than twenty years" in the proviso to s. 8 refer to the aggregate service of the officer or servant under any union in which he has served and not only to service under the particular union in which the joint appointment was made.

ACTION with witnesses.

This action was brought by the plaintiff against the defendant union claiming a declaration that he was entitled to be paid during his life out of the common fund of the defendant union a superannuation allowance under the Poor Law Officers' Superannuation Act, 1896.

In 1909 the plaintiff and his wife were appointed to the offices of master and matron respectively of the Eastbourne Union, those offices constituting a joint appointment within the meaning of s. 8 of the said Act. Previously to that appointment the plaintiff had served as an officer or servant under other unions, and the plaintiff alleged that his service,

(1) [1913] 3 K. B. 177.

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for the purposes of the Act, commenced in December, 1894, when at the age of thirteen he became the office boy or clerk of the master of the Merthyr Tydfil Union at a small salary of 1*s.* and afterwards of 2*s.* 6*d.* per week. The plaintiff alleged that he served in that capacity till January, 1900, when he was appointed temporary porter, and it was admitted that he had afterwards served under various other unions until he came to the Eastbourne Union in 1909. The plaintiff's wife died on January 22, 1918, and by her death the plaintiff's office as master of the workhouse was vacated as at the end of the current quarter, and he was not reappointed.

The only question of fact in dispute was as to the nature of the plaintiff's employment when acting as office boy or clerk of the master of the Merthyr Tydfil Union. It was admitted that while the plaintiff was receiving the 1*s.* or 2*s.* 6*d.* a week no deduction was made from these sums under s. 12 of the Act in respect of superannuation contributions, but prior to the commencement of this action the plaintiff had, with the consent of the Local Government Board, paid to the Merthyr Tydfil Union the amount of such deductions amounting to some 6*l.* odd.

On the question of law the defendant union contended that, even if the plaintiff had in fact served the various unions for not less than twenty years, he was not entitled to aggregate those services for the purpose of making up the period of twenty years entitling him to a superannuation allowance under the proviso to s. 8 of the Act.

The facts and material sections of the Act are fully stated in the judgment.

Macmorran K.C., *H. R. Pigeon* and *J. Flowers* for the plaintiff. The plaintiff claims under the proviso contained in s. 8, which provides that in the case of a joint appointment which terminates by the death of one of the holders, the survivor is entitled to a superannuation allowance if he "has served for not less than twenty years." Sect. 4 provides that all service by an officer or servant shall be aggregated whether the service has been continuous or not. The plaintiff therefore is entitled

to aggregate his service under the Merthyr Tydfil Union and other unions with his service as master under the defendant union. It is true that in s. 2, which applies to a different case, the expression "aggregated service" is used but the omission of the word "aggregated" in s. 8 is of no importance having regard to the general provision in s. 4, and on the true construction of s. 8 the words "served for not less than twenty years" apply to the aggregated service in the different unions in which the plaintiff was employed, and are not to be confined to his service under the defendant union alone.

As to the question of fact, the plaintiff was plainly a servant of the Merthyr Tydfil Union from the date of his employment as office boy or clerk of the master of that workhouse. His position was not affected by the fact that the proper deductions were not made from his small salary. The duty of deducting the amount did not lie on the plaintiff himself, and the amount which ought to have been deducted has in fact been paid by him before the commencement of this action.

Maugham K.C. and *Herbert Davey* for the defendants. The plaintiff is not entitled to any superannuation allowance under s. 8 not having served the defendant union for a full period of twenty years. Sect. 2 applies to a different case, that of a person who has attained the age of sixty years and has completed an "aggregate service" of forty years, and under that section and under s. 4 aggregation of different services is expressly provided for; but the plaintiff here is claiming under the exceptional case in the proviso contained in s. 8 where the word "aggregate" is omitted, and he is only entitled to a superannuation allowance if he "has served for not less than twenty years." That means service under the same union which made the joint appointment. It was not intended that there should be any aggregation of service in the computation of the length of service under the proviso contained in s. 8, and the omission of any express words to that effect shows that to be the true meaning of the Legislature. The contrary construction would lead to a singular result and throw a great burthen on the last union—in this case the Eastbourne Union—making the joint appointment.

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Sect. 4 is a definition clause applicable to s. 2 but not applicable to the proviso contained in s. 8. [They also referred to ss. 3, 13, 14, 19 of the Act.]

As to the question of fact the alleged service between 1894 and 1900 did not constitute the plaintiff a servant of the Merthyr Tydfil Union within the meaning of the Act. There is no record of his formal appointment by the guardians. Moreover no deduction pursuant to s. 12 of the Act was ever made from the small sums paid to him; and if the period prior to 1900 is properly excluded the plaintiff has not in any case served for not less than twenty years whatever construction be placed on s. 8 of the Act.

Macmorran K.C. in reply.

[In the course of the arguments reference was made to Poor Law General Order of July 24, 1847, articles 112 (prohibiting any pecuniary compensation for the labour of inmates); 155 (as to the mode of appointment of officers); 189 (as to the vacation of offices under joint appointment); 208 No. 6 (as to the duty of the master of the workhouse to assist in training youths in such employment as will best fit them for gaining their own living), and to *Austin* v. *Bethnal Green Union*. (1)]

PETERSON J. In this case the plaintiff and his wife were appointed in the year 1909 to be respectively master and matron of the workhouse of the Eastbourne Union. That was admittedly a joint appointment within the meaning of s. 8 of the Poor Law Officers' Superannuation Act, 1896. The wife died in January, 1918, and thereupon the appointment of the plaintiff as master also came to an end, and he was not reappointed to any office by the defendant guardians. In those circumstances the plaintiff claims that he is entitled to a superannuation allowance under the provisions of s. 8 of the Act of 1896. Two objections are taken, first, that that section only relates to service in the same union for a period of twenty years, and that the plaintiff had not served for a period of twenty years under a joint appointment, or

(1) (1874) L. R. 9 C. P. 91.

at all, with the defendant guardians, but only since the year 1909; and secondly, that, assuming that that view of s. 8 is erroneous, at any rate he has not served in the Eastbourne Union and other unions in which he was employed for an aggregate period of twenty years. The latter contention is based upon the particular facts of the plaintiff's career, and I propose therefore to deal with the facts first. Towards the end of 1894 the plaintiff was a boy at the Aberdare Industrial School which was under the control of the guardians of the Merthyr Tydfil Union. The superintendent of the school, Mr. Pearcy, had been constituted master of the workhouse, and, knowing the plaintiff to be an intelligent and sharp boy, apparently the idea occurred to him that it would be a good opportunity to employ him at the workhouse as the master's assistant, and I infer that this was a view which Mr. Pearcy was particularly anxious to put forward having regard to the fact that the master's clerk was then seriously ill, and, as appears from the books, the last payment that was made to him was made some time in the year 1894. The plaintiff went to the workhouse from the school in December, 1894, and there is an entry that he was discharged from the school on December 20, 1894. There is no record of a resolution by the guardians as to the employment of plaintiff in December, 1894, but in February, 1895, the guardians adopted a resolution of the Finance Committee "that the master's office boy (William E. Price) be paid at the rate of 1*s.* a week from the beginning of the current quarter." He was paid at that rate of 1*s.* a week, receiving board and lodging as well, and that amount was subsequently, in the course of a year or two, raised to 2*s.* 6*d.* a week, and subsequently in the year 1900 he was appointed temporary porter at the workhouse at a larger remuneration. The books of the guardians show that he was treated and considered as either the master's office boy or the master's clerk, and it seems that he did what the master required by way of carrying messages and keeping small accounts in the books for the master, and also, when the guardians met for the purposes of considering relief cases, he showed the applicants in and out of the board room. He

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in fact discharged such duties as he was called upon to discharge by the master under whom he was, and it is quite plain on the evidence that he was in the employment of the guardians at a salary of, in the first instance, 1*s.* a week, subsequently increased to 2*s.* 6*d.* a week and later to a larger sum, in all cases receiving also board and lodging as a part of the reward for the services which he rendered.

Now in those circumstances it appears to me perfectly hopeless to contend that the plaintiff was not a servant of the guardians. The contemporary evidence and the evidence of the books and the evidence of the clerk to the guardians, and the evidence of the plaintiff himself, establish beyond all question that he was, at any rate after the middle of February, 1895, a servant of the guardians of the Merthyr Tydfil Union, and he continued to be so until he left the union. His subsequent career is immaterial for this purpose as it is admitted that he was in the service of various other unions after the period that he left the Merthyr Tydfil Union in 1902, and the only real question, for the purpose of establishing that he had served for twenty years, is whether in the earlier portion of his career he was in the service of the Merthyr Tydfil Union. In my opinion he clearly was.

Then it is pointed out that under s. 12 of the Poor Law Officers' Superannuation Act, 1896, it is obligatory on every officer and servant in the service or employment of the guardians of a union to contribute annually a percentage amount of his salary or wages and emoluments according to the scale laid down by the Act, such amount to be from time to time deducted from the salary or wages payable to him and to be carried to and form part of the common fund of the union. It is admitted that the statutory amount was not deducted from the small pecuniary remuneration that this boy received, and the inference is endeavoured to be drawn from that fact that the boy was not a servant or officer of the union, but was merely a pauper who was being maintained by the union, and received some small trivial allowance in the way of pocket money from the guardians. But the evidence to which I have called attention already

clearly proves that that conclusion is erroneous. It must also be borne in mind that there is an express prohibition forbidding the guardians to pay any pauper compensation for labour performed by him. I accordingly hold that from 1894 onwards the plaintiff was a servant of the Merthyr Tydfil Union.

That being so, the question of law arises as to the true construction of s. 8 of the Poor Law Officers' Superannuation Act, 1896. Sect. 2 of the Act provides: "Subject to the provisions of this Act, every officer and servant in the service or employment of the guardians of a union or parish who shall become incapable of discharging the duties of his office with efficiency, by reason of permanent infirmity of mind or body, or of old age, or who shall have attained the age of sixty years and have completed an aggregate service of forty years, or who shall have attained the full age of sixty-five years, shall be entitled on resigning or otherwise ceasing to hold his office or employment, to receive during life out of the common fund of the union, a superannuation allowance according to the scale laid down in this Act. An officer or servant shall not be entitled to an allowance on the ground of old age unless he has completed the full age of sixty years. Where an officer or servant has attained the age of sixty-five years and the guardians are of opinion that it would be expedient in the interests of the public service that he should cease to hold his office or employment, it shall be competent for them to require him to retire upon payment to him of the superannuation allowance to which he may be entitled under this Act." Sect. 3 of the Act provides for the scale of superannuation allowance which is permissible under the provisions of the Act, and s. 4, which is a very material section, is to this effect: "All service by an officer or servant under any authority or authorities to whom this Act applies shall be aggregated and reckoned for the purposes of this Act, whether the service has been continuous or not, and whether his whole time has been devoted to the service or not." In other words the service of an officer or servant under this Act is to include not merely the service which he renders to the union which is liable for the

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superannuation allowance on the termination of the service, but includes all other service by him which has been rendered to the guardians in any union or parish or other body to which the Act applies. The result therefore is that that section provides that, in considering the service by the particular officer or servant, you have to aggregate all the service that he has rendered to any authority or authorities to which the Act applies. Sect. 8 begins by providing: "An officer or servant who has not become entitled to a superannuation allowance, and who loses his office or employment by reason of a reduction of staff, or of any alteration of areas or boundaries, or otherwise ceases to hold his office or employment by reason of bodily injury not occasioned by his own default, or of any other cause whatever other than his own misconduct or voluntary resignation, shall be entitled to receive, out of the common fund of the union, a sum equal to the amount of all his contributions to any such fund under this Act; but if he claims under this section and subsequently obtains a fresh office or employment, he shall not be entitled to reckon his service before obtaining such fresh office or employment towards a superannuation allowance under this Act," unless he does certain things. The next clause in s. 8 provides: "In any such case of loss of office or employment as aforesaid, the guardians may also, if they see fit, with the sanction of the Local Government Board, grant to the officer or servant a gratuity," as therein provided. Then comes the proviso on which the plaintiff relies: "Provided that when such loss of office or employment occurs in a case in which the death, resignation, or insanity of one of the holders of a joint appointment vacates the office of the other,"—that is the present case; the loss of office was occasioned by the death of his wife, who was the joint holder of the appointment with the plaintiff—"the officer or servant whose office or employment is so vacated,"—that is the plaintiff—"shall, unless he is reappointed by the guardians,"—the plaintiff was not reappointed—"and except where in the case of husband and wife the joint appointment is terminated owing to the misconduct of one of them,"—an event which has not happened—"be entitled to receive

during life, out of the common fund of the union, a superannuation allowance, according to the scale laid down in this Act, if such officer or servant has attained the age of fifty years, or has served for not less than twenty years." Therefore the proviso in substance enacts, applying it to the present case, that the plaintiff is entitled to receive during life out of the common fund of the union a superannuation allowance according to the statutory scale if he has done one of two things, namely, attained the age of fifty years, or has served for not less than twenty years. He has not attained the age of fifty years, and he contends that he has served for not less than twenty years. Now it is contended that the true construction of that section is that the person who loses the office or employment is only entitled to the superannuation allowance—I leave out the period of fifty years—if he has served the union which is responsible for the payment of his superannuation allowance "for not less than twenty years," in other words that the allowance is merely an allowance to be made by the particular union for a service of not less than twenty years rendered by the employee to that union. The first answer to that is that the section does not say so. The section says if the officer "has served for not less than twenty years." Still if the section stood alone it might be argued that according to its true construction the service contemplated was service with the particular union. But on turning to s. 4 I find that s. 4 expressly provides that all service by an officer or servant under any authority or authorities to whom this Act applies, shall be aggregated and reckoned for the purposes of this Act—not for the purposes of s. 2, or for the purposes only of some portion of the Act, but for the purposes of the Act as a whole, and therefore for the purpose of s. 8. Inasmuch as the proviso to s. 8 is part of the Act, and s. 4 provides that in arriving at the superannuation allowance under s. 8, all services rendered by the plaintiff under all the authorities which he has served are to be aggregated and reckoned for the purposes of the Act, in my view the service in question is the service which has been rendered by the plaintiff to the various unions which he has served in the course of his career, including the Merthyr

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Tydfil Union. The result therefore is that the plaintiff is entitled to be paid during his life out of the common fund of the Eastbourne Union the statutory superannuation allowance according to the scale laid down by the Act, and I make a declaration accordingly.

Solicitors for the plaintiff: *Lewis Barnes & Co., for Bedford & Wellsted, Newhaven.*

Solicitor for the defendants: *P. F. Walker, for F. Lawson Lewis, Eastbourne.*

A. C.

P. O. LAWRENCE J. 1920 *Feb.* 3.

In re HEARTS OF OAK LIFE AND GENERAL ASSURANCE COMPANY, LIMITED AND REDUCED.

[0013 of 1920.]

Company—Memorandum of Association—Alterations of Objects—Persons having Right to oppose—"Persons or class of persons whose interest will . . . . be affected by the alteration"—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 9, *sub-s.* 3.

The Companies (Consolidation) Act, 1908, s. 9, sub-s. 3, provides that before confirming an alteration of the memorandum of association of a company with regard to its objects, "the Court must be satisfied that sufficient notice has been given . . . . to any persons or class of persons whose interests will, in the opinion of the Court, be affected by the alteration . . . .":—

Held, that the sub-section only applies to persons, such as creditors and members of the company, whose interests in the company itself will be affected by the alteration; and accordingly that the Court will not on a petition for confirmation of an alteration of the objects hear a person having an interest outside the company that will be injuriously affected by the alteration.

In dealing with a petition for confirmation of an alteration of the objects of a company, the Court will assume, in the absence of evidence to the contrary, that the company will carry on its business properly, and will not therefore have regard to the fact that the alteration in its objects will enable the company to carry on a business competing with that of a body with a very similar name and so facilitate passing off.

PETITION of the above-named company for confirmation of a proposed extension of its objects.

The company was incorporated as a company with limited liability in the year 1903 under the Companies Acts, 1862 to 1900, with a share capital of 150,000 shares of 1*l.* each of which 120,075 shares had been issued and were fully paid. The objects for which the company was incorporated as stated in its memorandum of association were mainly the carrying on of life, fire and accident insurance.

At the end of 1919 it was resolved by special resolution of the company that its objects should be altered so as to enable the company (amongst other things) (1.) "To carry on the business of insurance of every kind in all its branches present and future throughout the world . . . ."; (2.) "To ensure payment during sickness and incapacity"; and (3.) "To grant insurance upon the contingency of injury or total loss by reason of accident or disease of any description. . . . ." The company claimed that the proposed extension of objects was required to enable them to carry on its business more efficiently and also to carry on businesses which under existing circumstances might conveniently and advantageously be combined with the business of the company.

At the hearing of the petition the Hearts of Oak Benefit Society, a registered friendly society and an approved society under the National Health Insurance Acts, appeared to oppose on the ground that the interests of the society would be injuriously affected if the company, bearing as it did a similar name to that of the society, were to have its objects extended so as to enable it to carry on a competing business.

On behalf of the company the preliminary objection was taken that the society was not entitled to be heard on the petition, and it is with this point that this report is alone concerned.

Mossop for the society. The society is entitled to be heard on the petition. It is a body to which notice should have been given under s. 9, sub-s. 3, of the Companies (Consolidation) Act, 1908 (1), because its interests will be injuriously affected

(1) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 9: "(1.) Subject to the provisions of this section a company may, by

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if the company is allowed to extend its objects to the provision of payments during sickness or incapacity. The company has a name so closely resembling that of the society that the Court, by sanctioning an extension of the objects that would enable it to do the same business as the society, would be assisting it to carry on its business in a manner calculated to deceive. When the company was originally formed the resemblance of name was unobjectionable because the company and the society were carrying on different kinds of business.

[P. O. LAWRENCE J. For the purpose of the preliminary point I will assume that the alteration of the objects would enable the company, if so minded, to carry on business so as to lead to deception.]

On that presumption the society is entitled to be heard on the petition under s. 9, sub-s. 3 (*a*). There is nothing in the clause to cut down the generality of the words "persons whose interests will . . . . be affected by the alteration." In any case the Court ought not in view of the wide jurisdiction conferred on it by s. 9, sub-s. 4, to allow the alteration of objects except on terms that would prevent confusion.

Jenkins K.C. and *F. Whinney* for the company. The words in s. 9, sub-s. 3 (*a*), must be limited to persons whose interest in the company will be affected by the alteration, that is, shareholders, creditors and persons such as participating

special resolution alter the provisions of its memorandum with respect to the objects of the company, so far as may be required to enable it—

"(*a*) to carry on its business . . . . more efficiently; or . . . .

"(*d*) to carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company; . . . .

"(2.) The alteration shall not take effect until and except in so far as it is confirmed on petition by the Court.

"(3.) Before confirming the alteration the Court must be satisfied—

"(*a*) that sufficient notice has been given to every holder of debentures of the company, and to any persons or class of persons whose interests will, in the opinion of the Court, be affected by the alteration; . . . .

"(4.) The Court may make an order confirming the alteration either wholly or in part, and on such terms and conditions as it thinks fit; . . . .

"(5.) The Court shall, in exercising its discretion under this section, have regard to the rights and interests of the members of the company or of any class of them, as well as to the rights and interests of the creditors . . . ."

policy holders. That this is the correct meaning is shown by sub-s. 5, which provides that the Court is to have regard to the "interests" of shareholders and creditors. Further, it would be highly inconvenient if the Court on such an application as this was bound in effect to try a passing-off action. This attempt to oppose is really of the nature of a quia timet proceeding, but, if the alteration in the objects were sanctioned the society would still be free to bring proper quia timet proceedings. Sub-sect. 3 (*a*) is dealing with notice and intends the Court to satisfy itself that notice has been given to those persons who, on a proper disclosure by the company to the Court, appear to be interested. It can have no reference to mere competitors in business. Further, the Court will assume that the company will carry on its business properly and not refuse to sanction the alteration of the objects because this might assist the company to act fraudulently.

Mossop in reply. Not only is the society affected in its interests so as to come within the sub-section, but the public interest is involved also, and the Court is concerned to protect the public and will not allow the alteration except on terms.

P. O. LAWRENCE J. A novel point of practice has arisen on this petition, which is presented by the company under s. 9 of the Companies (Consolidation) Act, 1908, for confirmation by the Court of an alteration of the provisions of its memorandum with respect to the objects of the company. Under that section the alteration must be sanctioned by special resolution and does not take effect "until and except in so far as it is confirmed on petition by the Court." Further, sub-s. 5 provides that the Court in exercising its discretion as to whether it should confirm the alteration, is to "have regard to the rights and interests of the members of the company or of any class of them, as well as to the rights and interests of the creditors"; and before confirming the alteration the Court has under sub-s. 3 to be satisfied that sufficient notice has been given to debenture holders and "to any persons or class of persons

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whose interests will, in the opinion of the Court, be affected by the alteration." Mr. Mossop appears on behalf of the Hearts of Oak Benefit Society and claims to be heard on the question whether the Court ought to confirm the alteration.

The first question which arises is whether the society is a person to whom notice ought to be given under sub-s. 3 (*a*) as one of the persons or class of persons whose interests will in the opinion of the Court be affected by the alteration and, consequently, a person who ought to have an opportunity of objecting to the alteration. The society contends that it is such a person because (although it is not interested in the assets of the company) its own interests are affected by the alteration which, if confirmed, is likely to lead to deception and confusion ; and there is no reason why the Court should cut down the generality of the words in sub-s. 3 (*a*). In my opinion the society does not come within the purview of sub-s. 3 (*a*). The notice contemplated by sub-s. 3 is, in my opinion, a notice to persons or classes of persons whose interests *in the company* may be affected. It does not, as Mr. Mossop contends, apply to persons whose interests outside the company may be affected. In effect, what he is asking the Court to do is to try the question whether the result of the company carrying on its new business under its present name would be to pass off such business as the business of the society. Nothing could be more inconvenient than to endeavour to try a passing-off action on an application under this section. I think that the words of this section and the collocation in which they occur point to persons who have an interest in the company which might be affected by the extension or restriction of the operations of the company, and do not apply to persons outside the company whose interests might be affected, because they are rival traders. I think the contention advanced on behalf of the company that the persons aimed at by sub-s. 3 (*a*) are persons falling within the category of the persons mentioned in sub-s. 5 is right. The Court must have regard to the rights and interests of the members

of the company and to the rights and interests of creditors. There may also, as Mr. Jenkins pointed out, be persons who are interested in the assets of the company otherwise than as members or creditors, such as policy holders in a mutual insurance company. Those are the kind of persons, in my judgment, who are referred to as having interests which may be affected and who should, therefore, have notice given to them under sub-s. 3 (*a*).

The society claims to be heard on the further ground that even though it may not be a person coming within the purview of sub-s. 3 (*a*) yet in the circumstances of this case it ought to be allowed to oppose the prayer of the petition in order to prevent the Court from lending its aid to a deception of the public. Mr. Mossop, however, expressly disclaimed any suggestion that the company had made the alteration with a view to defrauding the society or to deceiving the public. In my opinion it would be wrong on petitions under s. 9 to hear persons in the position of the society in this case, who come merely as rival traders fearing that the alteration might result in injury to their businesses. The Court, in sanctioning an alteration in the memorandum extending or restricting the objects of a company will presume, until the contrary is proved, that that company's business will be carried on in a legitimate and proper manner. Mr. Mossop says that however properly the company's business is carried on in the present case confusion and deception must arise. That, I venture to think, is an entire fallacy. There are many ways in which the company can carry on the same class of business as that carried on by the society without causing any confusion or deception. Mr. Mossop suggested that if I sanctioned this alteration in the memorandum it would amount to a sanction to the company to carry on its business so as to deceive the public by passing itself off as the society. I entirely demur to that proposition. If the company does anything in the nature of passing off its business as that of the society, the society will have its remedy and the Court will be free to grant an injunction notwithstanding the fact that the

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Court has sanctioned the alteration by which the company has been enabled to carry on the business.

Lastly, Mr. Mossop has referred me to sub-s. 4 of s. 9 under which the Court has power to confirm the alteration either wholly or in part and on such terms and conditions as it thinks fit. He argues that, regard being had to the fact that if the company begins to carry on the business which the society is already carrying on there will in all probability be confusion, he ought to be heard on the question whether the Court ought not either to impose some terms upon the company, to prevent such confusion, or to refuse to sanction those parts of the extended objects which will enable the company to carry on the same business as the society is carrying on. I do not think that I ought to hear the society on this question and I think I should be wrong in imposing any terms or conditions or in refusing to confirm the alteration as asked. The Court on occasions such as this has, in my view, no concern with rival traders or with possible trading disputes. The alteration of the memorandum of association is entirely a domestic affair, and it is only those persons who have an interest in the company who are to be considered. If the Court were to give ear to rival traders such as are represented in the present instance by Mr. Mossop, it would be burdened with matters entirely irrelevant for the purpose of coming to a conclusion under sub-s. 1 of s. 9 whether the proposed alteration ought or ought not to be confirmed. What the Court has to see is that the case is brought within one or more of clauses (*a*) to (*e*) of sub-s. 1 and that all persons who have a present interest in the particular company, be they members or creditors, have had an opportunity of expressing their views upon the extension or restriction or other alteration of the memorandum of association.

I decline to hear the Hearts of Oak Benefit Society on the present petition. (1)

Solicitors: *F. S. Wingent; Sparks, Whitehouse, Russell & Co.*

(1) The alteration in the objects was subsequently confirmed.

H. C. G.

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[1917. W. 17.]

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Jan. 14; *Feb.* 5

Company—Debenture-holder's action—Notice of Judgment to Debenture Holders—Plaintiff's Costs of Action—Taxation—Receipt and Return of Debentures sent for Production—Practice.

Where the judgment in a representative debenture-holder's action directs usual accounts and inquiries and the plaintiff's solicitor sends to every debenture holder not a party to the action notice of the judgment in the form given in the Annual Practice, 1918, p. 1686, the "plaintiff's costs of action" properly include not only his solicitor's charges for sending out the notices but also his charges for acknowledging, giving a receipt for and returning debentures sent him by debenture holders for production in chambers in pursuance of the notice. This rule applies whether the assets of the company are sufficient or insufficient to pay the debentures in full, and it also applies where there is a trust deed to secure the debentures and the judgment directs execution of the trusts thereof.

The rule referred to in *In re Ticehurst Water Co.* (1915) 139 L. T. J. 295 that the costs of a secured creditor in establishing his debt must be added to his security explained and distinguished.

The statement in the Annual Practice, 1920, p. 276, repeated in other Practice Books, to the effect that it is permissible for any debenture holder served with the above notice to enter an appearance, is erroneous. A debenture holder so served who desires to attend the proceedings must apply by summons for leave to do so.

ADJOURNED SUMMONS.

This was an application by the plaintiff to review the taxing Master's decision under these circumstances.

The action was a usual representative debenture-holder's action in which the plaintiff sued on behalf of himself and all other the holders of first mortgage debentures issued by the company; the defendants being the company, two persons on behalf of themselves and all other the holders (except the plaintiff) of the second mortgage debentures issued by the company, and the holders of a third mortgage debenture issued by the company.

The judgment in the action dated January 12, 1917,

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directed an account of what was due to the plaintiff and all holders of any of the first mortgage debentures issued by the company under and by virtue of such debentures; and an inquiry "what other incumbrances affect the property comprised in or charged by the said debentures or any and what parts thereof." The plaintiff's solicitor in giving notice of the judgment to all debenture holders not parties to the action followed form 9A in Appendix L, which is given in the Annual Practice, 1918, p. 1686, and concludes: "If you desire it you can forward the debentures by post, or otherwise, to us for production. We will return them by post in due course."

A receiver and manager of the company's property and business had been appointed who had realized the assets, and the fund was insufficient to pay the first debenture holders in full. Accordingly by the order on further consideration dated July 15, 1919, the plaintiff's costs of the action were directed to be taxed as between solicitor and client, and under this order the plaintiff's solicitors carried in their bills of costs for taxation.

On the taxation numerous small items amounting altogether to about 7*l.* were disallowed by the taxing Master on the ground that they were costs of proving the claim of a debenture holder and as such, the fund being insufficient, were payable by the debenture holder himself, or at best were to be added to his security as part of his claim.

The plaintiff lodged the following objections to the disallowance:—

"These items of costs are incurred in consequence of a notice to debenture holders charged on p. 29 of the Bill, and which notice contains the following paragraph: 'If you desire it you can forward the debentures by post or otherwise to us for production. We will return them by post in due course.' The items in question relate to the receipt and return of debentures entrusted by the debenture holders to the plaintiff's solicitors for production to the Court in pursuance of this notice. It is submitted that the costs

in question are plaintiff's costs of action covered by the order for taxation.

"At some time prior to 1896 it was the practice of the Court in representative debenture-holder's actions to serve debenture holders with notice of the judgment under Order XVI., r. 40, but in May, 1896, the judges of the Chancery Division gave certain directions as to practice to the Masters (see note in Annual Practice, 1920, p. 276) as a result of which a circular form of notice (being Form 9A in Appendix L) to debenture holders was settled and adopted. Such Form though in the Appendix to the Rules is not a part of the Rules.

"It is the duty of the plaintiff's solicitors to adopt this notice which contains the invitation to the debenture holders to entrust their debentures to the plaintiff's solicitors for production to the Court in answering the enquiries directed by the judgment, and it is submitted that thereby the costs connected with the receipt and return of all debentures become the plaintiff's costs and not the costs of the several debenture holders.

"A fee for the attendance of the plaintiff's solicitors in chambers to produce the debentures is certified by the Chancery Master as proper to be allowed to the plaintiff's solicitors and such attendance is charged at p. 34 of the Bill."

The taxing Master's answers to these objections were as follows:—

"The question raised by these objections is one of considerable interest and importance, for although the actual amount in each case is not very large the costs in question occur in every debenture-holder's action and may in the aggregate in any action amount to a considerable sum.

"I disallowed them because I conceived and still conceive that they are costs of proving the claim of a debenture holder and as such, where the fund is insufficient, fall to be paid by the debenture holder himself or at best to be added to his security as part of his claim. If this is so, they are not

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payable out of the general fund and consequently would be properly disallowed upon the present taxation.

"A debenture holder is a creditor of the company issuing the debenture: his action is for the purpose of obtaining a declaration of a charge and of having that charge enforced. The costs of a creditor with regard to establishing his debt are the subject of the 47th Order of 26th August, 1841 (Sanders' Orders in Chancery, p. 886), which provides that a creditor who has come in and established his debt before the Master under a decree or order in a suit shall be entitled to the costs of so establishing his debt and the same shall be taxed by the Master and added to the debt; and the amendment of this rule by the 6th Order of 11th April, 1842 (ibid. p. 909), relates only to the method of ascertaining the costs and does not affect their incidence. In *Morshead* v. *Reynolds* (1) Sir John Romilly M.R. said that he considered it settled that the costs of creditors of establishing their debts must be added to the debt established, and that the apportionment (the fund in that case as in this being insufficient) must then be made with reference to the whole amount. This case was stated by Eve J. so lately as 1915 to be still law and applicable to debenture holders who had incurred costs in proving the title to their debentures: *In re Ticehurst Water Co.* (2) The distinction between the incidence of these costs and that of the general costs of the action is emphasized in *Carrick* v. *Wigan Tramways Co.* (3), in which Chitty J. held that the plaintiff (who sued on behalf of himself and all other debenture holders) was entitled to the costs of the action other than such (if any) as had been incurred by him in support of his own security only. The costs of producing debentures seem to be costs of establishing his debt as they relate to a proceeding to prove the debenture-holder's claim: see form of advertisement given in Daniell's Chancery Forms, 6th ed., by R. White, form 1577. For these reasons I consider that upon principle these are costs which must be borne by the individual debenture holder

(1) (1856) 21 Beav. 638. (2) 139 L. T. J. 295.
(3) [1893] W. N. 98.

and not paid out of the fund in priority to the principal due upon the debentures which would be the effect of allowing them in the Bill now in process of taxation.

"But it is said by the objectants that the incidence of these costs is altered by the form of notice of judgment adopted by the Chancery Judges in 1896 and in fact framed by the late Master Walker. But I am unable to detect anything in the notice which carries such an effect. The notice informs the debenture holder that if he desires to participate in the benefit of the judgment it will be necessary that his debentures should be produced before the Master on a given day when he must attend either personally or by his solicitor or agent at a certain place and produce his debentures. At the end of the notice the plaintiff's solicitor adds (I agree by authority) 'If you desire it you can forward the debentures by post or otherwise to me for production. I will return them by post in due course.' The course so proposed is entirely optional for the debenture holder, if it were not adopted there is no doubt that the costs of production would fall upon the debenture holder and not upon the fund; indeed the only way in which any question of their falling upon the fund arises is that the debentures are in fact acknowledged, produced and returned by the solicitor who is the plaintiff's solicitor and as the plaintiff's solicitor has a bill of costs payable out of the fund.

"In my opinion however this work is not done for the plaintiff at all but for the debenture holder who has responded to the authorized offer of the solicitor to employ him for the purpose. That this is the true relationship of the parties seems to me to be indicated by the consideration of what would happen in two extreme cases. If the fund accidentally vanished to whom would the solicitor be able to look for costs? Not to the plaintiff who certainly did not employ the solicitor to look after other people's securities in which he had no interest. The distinction drawn in *Carrick* v. *Wigan Tramways* (supra) seems to indicate that even the production of the plaintiff's own debenture is not a necessary part of his proceedings as plaintiff and the

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costs of doing so not part of the 'plaintiff's costs' of the proceedings. Or if the solicitor lost the debenture could the owner proceed against the plaintiff in respect of the default of his professional agent, in which character the solicitor signs the notice?

"I believe the concluding paragraph of the notice merely to imply that, by employing the plaintiff's solicitor as the hand for the production of the debenture, the holder will probably incur less costs than he would by employing a separate solicitor and not to imply that if the debenture holder adopted the suggested course costs which would otherwise fall on him would be borne by a fund in which others were interested beside himself.

"For these reasons I overrule the objections."

The plaintiff issued a summons to review the taxing Master's decision.

Roope Reeve for the summons. Since 1896 notice of the judgment in a debenture holder's action has invariably been served by letter or advertisement: Annual Practice, 1920, p. 276. The latter is the form No. 9A in Appendix L set out in Part II., Div. I., Annual Practice, 1918, p. 1686. The concluding paragraph, "If you desire it, etc.," has been in use since 1906. The costs of the plaintiff's solicitor for preparing and sending out these notices have always been allowed on taxation as part of the plaintiff's costs of action. The debentures entrusted to the plaintiff's solicitor for production by debenture holders in pursuance of the notice are indorsed with a memorandum when produced in chambers to the effect that the debentures have been produced in the action: Annual Practice, 1918, Part II., p. 2302. The memorandum is impressed on the debenture by a rubber stamp. The plaintiff's solicitor obtains the rubber stamp and lodges it in the Master's office. The cost of obtaining the rubber stamp and attending the production and stamping of the debentures are also always allowed as part of the plaintiff's costs of action. This procedure lessens the costs spent in litigation and saves time and expense, and there is no distinction whether the

fund is sufficient or insufficient. The plaintiff's solicitor's costs of acknowledging, giving a receipt for and returning debentures sent to him for production have hitherto always been allowed on taxation. If they are disallowed he will not get them at all, because there is no retainer of him as solicitor by the debenture holder who sends his debenture for production to the Court in answer to the notice. It is submitted that the authorities referred to by the taxing Master are not of much assistance, and that the reasons given for the disallowance are fallacious.

No one appeared in support of the taxing Master's decision.

Cur. adv. vult.

Feb. 5. P. O. LAWRENCE J. This is an application by the plaintiff in a debenture-holder's action to review the taxation of his costs. By the judgment, dated January 12, 1917, the usual account of what was due to the plaintiff and all other holders of debentures issued by the defendant company was directed. The property charged by the debentures has been realized and the proceeds are insufficient to pay the debenture in full. Accordingly by the order on further consideration, dated July 15, 1919, the plaintiff's costs of the action were directed to be taxed as between solicitor and client. On the taxation of these the taxing Master has disallowed all costs in connection with the receipt and return by the plaintiff's solicitors of the debentures forwarded to them for production in chambers in pursuance of the invitation in that behalf contained in the usual notice sent by the plaintiff's solicitors to the general body of debenture holders. On the present application the plaintiff contends that these costs ought to have been allowed.

The amount involved in this case is small, but as (in accordance with the present practice) similar costs must be incurred in the great majority of debenture-holders' actions and as in many cases these costs amount to a substantial sum, the question which has arisen is one of general importance. I reserved my judgment in order to ascertain

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the views of my brother judges in the Chancery Division, because I think it is desirable that in a question of this kind there should, if possible, be uniformity of practice in all the Chancery Courts. I have now had an opportunity of consulting my brother judges and I have their authority for saying that they concur in this judgment.

In May, 1896, the Chancery Judges directed the Masters that in ordinary cases the judgment in a debenture-holder's action should not be served on the debenture holders, but that they should have notice given to them by circular letter or advertisement: see Annual Practice, 1920, p. 276. The form of the notice (which notice has to be signed by the plaintiff's solicitor and has to be sent by him to every debenture holder who is not a party to or has not obtained leave to attend the proceedings) was settled by North J., and is to be found in the Annual Practice, 1918, vol. ii., p. 1686, where for convenient reference it is printed as No. 9A in Appendix L to the Rules of the Supreme Court, 1883, although (as stated by the editors) it is not part of that appendix. This notice as originally settled did not contain the concluding paragraph now appearing in the form of notice printed in the Annual Practice. This paragraph is as follows: "If you desire it, you can forward the debentures by post, or otherwise, to me for production. I will return them by post in due course." This paragraph appears to have been added to the notice some time prior to the year 1906, as it appears for the first time in the 1906 edition of the Annual Practice. The reason no doubt for the addition was the delay and inconvenience arising in most cases owing to the necessity of each debenture holder having to attend by himself or by his agent to produce his debenture or debentures. In cases where the debenture holders were numerous and were scattered all over the United Kingdom great difficulty was experienced in procuring their attendance and in many cases the attendance of a large number of persons occasioned a block in the chambers and in the adjoining corridors. By the direction of the Chancery Judges each debenture upon its production in chambers is

to be indorsed with a memorandum consisting of a notice of the proceedings: see Annual Practice, 1918, vol. ii., p. 2302. The practice of getting the debenture holders to send their debenture to the plaintiff's solicitor for production in chambers is therefore one which was established for the proper administration of justice in these cases and is one which is obviously for the benefit of all persons interested in the property charged inasmuch as it saves time, labour and expense. The plaintiff, in a debenture holder's action has the duty cast upon him of answering the accounts and inquiries directed by the judgment. His solicitor has to bring into chambers an affidavit proving the names and addresses of the debenture holders and the amounts due to each, and has to prepare and send out the notices to the debenture holders calling upon them to produce their debentures. Moreover, as the plaintiff is responsible for the conduct of the action, it is the duty of his solicitor to attend in chambers when the debentures are produced. The costs of doing all this work are usually, and I think properly, allowed as part of the plaintiff's costs of action. The longer the plaintiff's solicitor's attendance in chambers is and the more often he has to write to those debenture holders who had neglected or been unable to attend on the appointed day, the more costs are thrown on the fund. The fund cannot, of course, be distributed until the result of the account has been certified. When, under the present practice, the debentures are sent by post to the plaintiff's solicitor for production he must necessarily write letters acknowledging their receipt. If they are brought to his office by the debenture holders themselves, or by some person on their behalf, he must attend upon the bearers and give them receipts. After the debentures have been produced and indorsed in chambers he must send the debentures back to the holders. It cannot reasonably be suggested that the plaintiff should pay the costs of doing this work out of his own pocket, nor that the solicitor should do this work gratuitously. The taxing Master suggests that the solicitor should recover the costs in connection with the receipt and

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return of the debentures from the debenture holders who send or bring their debentures to him. The answer to this suggestion is that under the notice as framed it is extremely doubtful whether the debenture holders are legally liable to pay any such costs and even if they were it would be practically impossible for the solicitor to recover such costs. The inevitable result, if the taxing Master is right, will be that the solicitor will send out the notices without the concluding paragraph, at all events in those cases in which it is most important it should be retained and the difficulties which were formerly experienced would be revived.

The taxing Master in his answers to the plaintiff's objections states that in his opinion the costs in question are costs of proving the claims of the debenture holders and therefore ought to be borne by the debenture holders themselves or added to their securities as part of their claims. He then cites certain authorities, including the case of *In re Ticehurst Water Co.* (1), decided by Eve J., which shows that there is a settled rule that costs incurred by creditors in administration actions and by debenture holders in debenture-holders' actions in establishing their debts must be added to the debts so established. In my opinion this rule does not apply to the costs which are under consideration on the present application and nothing in this judgment must be taken to throw any doubt on the existence of the rule. The costs with which I am dealing are not in my opinion costs of establishing a debt within the meaning of the authorities referred to, but fall under the category of administration expenses incurred for the benefit of all persons interested in the fund and in order to assist the Court in the due administration of such fund. There is no distinction in principle between the costs of preparing and sending out a notice to each debenture holder calling upon him to produce his debentures in chambers and inviting him to send them to the plaintiff's solicitor for that purpose (which costs are admittedly properly included in the plaintiff's costs of action) and the costs of preparing

(1) 139 L. T. J. 295.

and sending a receipt for and of returning the debentures which the debenture holder forwards to the plaintiff's solicitor for production. All such costs are incurred by the plaintiff in order to facilitate the completion of the certificate in answer to the account directed by the judgment. The plaintiff owes a duty to the Court and to the debenture holders who are not parties to the action to bring about the completion of this certificate as expeditiously as possible, and all reasonable costs incurred by him in performing this duty ought to be allowed to him as part of his costs of action. The costs to which the rule referred to by the taxing Master is primarily intended to apply are costs incurred by a debenture holder in establishing the validity of or ownership of, or the amount due under, his debentures, where there is a dispute or doubt as to such validity, ownership or amount. No doubt if a debenture holder does not avail himself of the invitation to send his debentures to the plaintiff's solicitor for production, but elects to produce them himself, or by a special agent, he cannot recover his costs of such production against the fund, but must add them to his debt. The costs so incurred in my opinion stand on an entirely different footing from the costs under consideration on the present application. They are not incurred by a party to the action in pursuance of any duty cast upon him by the Court and fall under the general rule that all costs reasonably incurred by a secured creditor in relation to his security must be added to his security.

In the result I hold that the taxing Master ought to have allowed the costs in question on the present application. In order to avoid any doubt in future cases, I desire to add that the reasons hereinbefore expressed apply equally to cases in which the fund is sufficient to pay the debentures in full and the plaintiff's costs are consequently directed to be taxed as between party and party. They also apply to cases in which there is a trust deed to secure the debentures and the judgment directs execution of the trusts of such deed. I also desire to add that the statement contained in the Annual Practice, 1920, p. 276 (and repeated in other Practice

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Books), to the effect that it is permissible for any person served with the notice referred to in the Judges' Resolution of May, 1896, to enter appearances, is erroneous. The persons served with such a notice cannot properly enter appearances, but must, if they desire to attend the proceedings, apply by summons for leave to do so. Any appearances which may have been entered by such persons without leave are in my opinion wholly irregular.

The usual course to adopt would be to remit the plaintiff's bill to the taxing Master with a direction to review his taxation in the light of my present decision, but, as this course would I think involve an expense out of proportion to the amount in question in the present case, I propose to make an order that the costs under consideration on this application be included in and dealt with upon the next taxation of the plaintiff's costs in this action. The costs of this summons and of the objections leading up to it will be costs in this action.

Solicitors: *Routh, Stacey & Castle, for W. A. Maslen, Bournemouth.*

H. L. F.

In re SPRINGBOK AGRICULTURAL ESTATES, LIMITED.

P. O. LAWRENCE J.

1920

March 2.

[0054 of 1920.]

Company—Winding Up—Surplus Assets—Direction to pay Arrears of Preference Dividend—No Profits earned and no Dividends declared—To what extent Arrears payable.

Followed. In re WHARFEDALE BREWERY CO. LD. [1952] 1 Ch. 913

A company incorporated in 1903 passed a special resolution in 1905 sanctioning the issue of preference shares and providing that the dividends on them should be paid out of profits only and that "In the event of the winding up of the company the holders of the preference shares shall be entitled to have the surplus assets applied first in paying off the capital paid up on the preference shares . . . . , secondly, in paying off the arrears, if any, of the preferential dividend . . . . to the commencement of the winding up and thereafter to participate rateably with the holders of other shares in the residue, if any, of such surplus assets which shall remain after paying off the capital paid up on such other shares." In 1919 the company went into voluntary liquidation and there were surplus assets in the hands of the liquidators. No preference dividends had ever been declared nor profits earned :—

Held, that all unpaid preferential dividends were "arrears" of preferential dividends although no profits had been earned by the company, so that subject to the payment off of the preference shares the surplus assets were applicable in the first place in paying off the whole of the unpaid preferential dividends down to the commencement of the winding up.

In re W. J. Hall & Co. [1909] 1 Ch. 521 not followed.

Dicta of Neville J. in *In re New Chinese Antimony Co.* [1916] 2 Ch. at p. 118 followed.

SUMMONS in the winding up of the above-named company.

The company was registered on January 7, 1903, under the Companies Acts, 1862 to 1900, with a capital of 8500*l.* divided into 85 shares of 100*l.* each. By special resolutions passed and confirmed on April 13 and May 3, 1905, each of the shares was divided into 100 shares of 1*l.* each and the 6900 shares of 1*l.* each, representing 69 shares of 100*l.* each which had then been issued and were fully paid up, were given the name of ordinary shares while the 1600 shares of 1*l.* each, representing the sixteen shares of 100*l.* each which were then unissued, were called preference shares.

By the fourth special resolution it was provided that the

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preference shares should have attached to them the following (amongst others) special rights and privileges :—

"(*a*) The holders of such preference shares shall be entitled to receive out of the profits of the company as a first charge a cumulative preferential dividend at the rate of 10 per cent. per annum on the capital for the time being paid up on such shares respectively."

"(*d*) In the event of the winding up of the company the holders of the preference shares shall be entitled to have the surplus assets applied first in paying off the capital paid up on the preference shares held by them respectively, secondly, in paying off the arrears, if any, of the preferential dividend aforesaid to the commencement of the winding up and thereafter to participate rateably with the holders of other shares in the residue, if any, of such surplus assets which shall remain after paying off the capital paid up on such other shares."

Of the preference shares 1227 were issued and credited as fully paid up.

By a special resolution passed and confirmed on November 27 and December 12, 1919, the company went into voluntary liquidation. No profits had ever been earned by the company and no dividends had ever been paid by the company upon either the preference or ordinary shares. The liquidators had a sum of 5000*l.* or thereabouts of surplus assets available for distribution amongst the members of the company in accordance with their rights, and on February 12, 1920, they issued the present summons asking whether the surplus assets remaining after paying off the capital paid up on the preference shares ought to be applied in payment of any and what arrears of unpaid preferential dividend and subject thereto in or towards payment of the capital paid up on the ordinary shares.

H. C. Bischoff for the liquidators.

H. E. Wright for the ordinary shareholders. This case is covered by the decision in *In re W. J. Hall & Co.* (1) There

(1) [1909] 1 Ch. 521.

Swinfen Eady J. held upon a practically identical provision in the articles that unless profits had been earned while the company was a going concern out of which dividends could have been declared, there could be no arrears of dividends payable out of surplus assets in the winding up. The reasoning of his decision was doubted by Neville J. in *In re New Chinese Antimony Co.* (1) but the question never really arose there as profits had been earned.

Simonson for the preference shareholders was not called upon.

P. O. LAWRENCE J. In this case a short question arises on the construction of a special resolution passed concerning the rights of preference shareholders of the company. The resolution is in substance similar to though not in identically the same language as the material article of association in *In re W. J. Hall & Co.* (2) and the material resolution in *In re New Chinese Antimony Co.* (1).

So far as the construction of clause (*d*) of the fourth resolution is concerned, I have come to the conclusion that the surplus assets in the winding up of the company ought to be applied, first, in paying off the capital paid up on the preference shares, and secondly, in paying off the arrears of the preferential dividend up to the commencement of the winding up; and by these latter words I mean any deficiency in the dividend of 10 per cent. per annum which under clause (*a*) of the same resolution the preference shareholders would have been entitled to receive out of the profits of the company while it was a going concern had there been sufficient profits to admit of a declaration and payment of the dividend in full.

It has been argued that the matter is governed by the decision of Swinfen Eady J. in *In re W. J. Hall & Co.* (2) That case was decided on the construction of an article which though similar to clause (*d*) of the fourth resolution was not in precisely the same words. I do not think that I am bound by that decision as the words are different, but in

(1) [1916] 2 Ch. 115. (2) [1909] 1 Ch. 521.

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any case I do not agree with the reasons given by the learned judge for his decision. He seems to have held that the amount of the arrears of preference dividends was limited to the amount of such dividends as could have been properly declared but was not actually paid while the company was a going concern. The learned judge decided that there could be arrears of dividends although no dividends had been declared, and in this I agree with him; but he then proceeded to hold that it was essential that profits should have been earned out of which a preferential dividend could have been declared and paid before it could be said that the dividend was in arrear. In my view that is not the true construction of the special resolution in this case. I am of opinion that on its true construction the meaning of "arrears" of preference dividend is the amount by which the dividends if any paid out of profits while the company was a going concern fell short of the full dividend of 10 per cent. Consequently I hold that there were arrears of dividends although there never were any profits out of which the dividends could have been paid and that now that the winding up has commenced the surplus assets are liable to meet not only the capital of the preference shares but also the whole of the 10 per cent. preference dividend.

I think Neville J. in *In re New Chinese Antimony Co.* (1) took the view that I am now taking. He said (3), dealing with *In re W. J. Hall & Co.* (2): "In that case Swinfen Eady J. went on to decide that there could be no arrears of dividends payable except so far as there had been profits. With all deference I fail to follow that part of the decision, but it does not apply to this case. I am dealing with the division of surplus assets, but not with the declaration of a dividend. I cannot see that it makes any difference whether there are profits or not." And then he goes on to point out that there were abundant profits. It is quite true that these dicta were not necessary to the decision of the case before him but I fully agree with them and, as it is necessary here for me to express my opinion on the

(1) [1916] 2 Ch. 115, 118. (2) [1909] 1 Ch. 521.

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construction of the resolution, I do so in the sense of those dicta with which I agree.

I will make a declaration accordingly that the surplus assets ought to be applied first in payment of capital paid up on preference shares, and secondly in payment of all preferential dividends down to the commencement of the liquidation which have not been paid and that subject thereto the balance ought to be distributed amongst the holders of the ordinary shares.

Solicitors: *Smiles & Co.* for all parties.

H. C. G.

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1920

March 12.

GATES *v.* W. A. AND R. J. JACOBS, LIMITED.

[1920. G. 49.]

Lease—Breaches of Covenant—Action to recover Possession—Statement of Claim—Service of Statutory Notice of Breaches not specifically pleaded—Implied Condition Precedent—Practice—Conveyancing Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 14—*Order* XIX., *rr.* 4, 14—*Order* XXV., *r.* 4.

The service on a lessee of the notice required by s. 14 of the Conveyancing Act, 1881, and his non-compliance therewith being a condition precedent to the lessor's right of action to recover possession of the demised premises, the due performance by the lessor of the statutory condition is of necessity implied and need not be specially pleaded in his statement of claim in such an action.

MOTION.

In March, 1911, E. Gates, being possessed of Nos. 53 and 55, Great Eastern Street, Shoreditch, for a long term of years, by deed dated March 13, 1911, granted No. 55, Great Eastern Street, to L. Joseph for a term of 21 years from December 25, 1912, at the rents therein mentioned, and L. Joseph covenanted that he would not during the term without the previous written licence of the landlord permit to be made any alteration

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of any kind externally or internally to the existing buildings. This lease was now vested in the defendant company.

The plaintiffs were the executors and trustees of the will of E. Gates, and by a deed dated June 24, 1919, they demised No. 53, Great Eastern Street, aforesaid, to the defendant company for the term of 14 years from September 29, 1919, at the yearly rent therein mentioned, and the company entered into restrictive covenants similar to those in the deed of March 13, 1911.

On January 5, 1920, the plaintiffs issued a writ against the defendants to recover possession of Nos. 53 and 55, Great Eastern Street, for breaches of covenant committed by them and for damages, and by their statement of claim gave particulars of divers material breaches of covenant, but did not allege that the statutory notice of breaches required by s. 14 of the Conveyancing Act, 1881, had been served on the defendants and had not been complied with. The defendants now moved that the statement of claim might be struck out as disclosing no reasonable cause of action and being vexatious.

J. W. Beaumont for the motion. The application is under r. 4 of Order xxv. The service of the statutory notice is a material averment which is of the essence of the plaintiff's cause of action, and must be specifically pleaded. It is not a condition precedent within the meaning of r. 14 of Order xix., and the omission to plead it makes the statement of claim demurrable: per Lord Buckmaster *Fox* v. *Jolly*. (1) The plaintiff should amend his pleading.

H. W. Liversidge for the plaintiff. I agree that the service of the statutory notice is an essential averment, but it is a condition precedent: *Jolly* v. *Brown* (2), which is necessarily implied in the statement of claim and need only be proved at the trial. I rely on the latter part of r. 14 of Order xix. My pleading implies that all conditions precedent to the plaintiffs' right to bring the action have been complied with. If the defendants in their defence plead that the notice was not given, the onus will be on them to prove that at the trial.

(1) [1916] 1 A. C. 1, 8. (2) [1914] 2 K. B. 109, 129.

J. W. Beaumont in reply. Assuming the notice is a condition precedent, it is a condition the performance of which it is intended to contest, and therefore under r. 14 of Order XIX. it should be distinctly specified in the plaintiffs' pleadings, and r. 4 of the same order also provides that a party must plead every material fact on which he relies. In Bullen and Leake's Precedents of Pleadings, 7th ed., pp. 888–890, the forms of statements of claim, in actions by a lessor against a lessee for recovery of possession for breaches of covenant, state the giving of the notice and its non-compliance. It is the universal practice in such cases to plead the notice. I am instructed that no notice was given.

H. W. Liversidge. I do not agree to that.

P. O. LAWRENCE J. This is an application which raises a question of practice of some importance. The action is by landlords to recover possession of demised premises by reason of the breaches of covenant alleged to have been committed by the lessees. Under s. 14 of the Conveyancing Act, 1881, a notice has to be served on the lessee specifying the particular breaches of covenant complained of, and unless and until such a notice is served and the lessee fails within a reasonable time to remedy the breaches and to make reasonable compensation, the lessor cannot enforce his right of re-entry. Therefore there is under s. 14 a condition precedent to be performed before an action for recovery of possession will lie. Mr. Liversidge has argued that under r. 14 of Order XIX. an averment of the performance of that condition is implied in his statement of claim and need not be specifically alleged. On the other hand Mr. Beaumont has urged that the non-averment in the statement of claim of the performance of the condition renders the pleading demurrable, and for that he relies on a passage in the speech of Lord Buckmaster in *Fox* v. *Jolly* (1) where after quoting s. 14 he says: "If such condition were not satisfied and entry were attempted at common law, such entry would be a trespass; if proceedings were instituted to obtain possession they would be instantly

(1) [1916] 1 A. C. 1, 8.

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demurrable." I do not think that Lord Buckmaster had r. 14 of Order XIX. in his mind; what he meant in making that statement was that if no such notice had been given the action would not be maintainable. That is a different thing from saying that the notice must be specifically pleaded. In my judgment the concluding words of r. 14 of Order XIX. mean that an averment that the notice was given, although not specifically pleaded, must be implied. In other words the statement of claim must be read as if it contained an allegation that the plaintiffs had given the necessary notice under s. 14 of the Act before the commencement of the action. It is said that the absence of the plea is embarrassing, but I fail to see how that can be so because the defendants can obtain particulars of the notice by discovery in the action. I cannot therefore say that the plaintiffs' pleading discloses no reasonable cause of action or that it is frivolous or vexatious or even embarrassing. The motion will be dismissed with costs.

Leave to appeal was granted.

Solicitors: *Nowell & Turner; Cooper, Walker & Co.*

H. L. F.

MORTIMER *v.* BECKETT.

RUSSELL J.

[1920. M. 140.]

1920

February 13.

Contract for Personal Services—Injunction—Affirmative Agreement—Implied Negative Stipulation—Need for Independent Negative Stipulation.

The plaintiff having borne the expense of training the defendant as a boxer from 1911 to 1914, the defendant in 1914 entered into an agreement with the plaintiff in the following terms: "In consideration of the sum of ten shillings (10s.) and also in consideration of your many services rendered and to be rendered, to me, I undertake that you shall have the sole arrangements of matching me for all my boxing contests and engagements during the period of the next seven (7) years, and . . . . I undertake that . . . . you are to benefit to the extent of fifty (50%) per cent. of any purses put up for me above the sum of 25*l.* (twenty-five pounds) and in other specified ways. In December, 1919, the defendant declined to employ the plaintiff any longer. The plaintiff now moved in this action for an interim injunction to restrain the defendant from entering into any boxing engagement except such as had been, or should be, arranged for him through the plaintiff.

Held that, although an implied negative agreement to employ no one but plaintiff for arranging boxing engagements might be inferred from the word "sole," no injunction could be granted in the absence of an independent negative stipulation to that effect.

Lumley v. *Wagner* (1852) 1 D. M. & G. 604, and *Whitwood Chemical Co.* v. *Hardman* [1891] 2 Ch. 416 applied.

Held also, that the services to be rendered by the plaintiff were left so undefined that the agreement lacked mutuality, and that for this reason also the Court should, in its discretion, refuse any injunction.

MOTION.

The plaintiff, Bernard Mortimer, alleged that in 1908 he first met the defendant, Joe Beckett, who was then about sixteen years of age; that in 1911 he saw the defendant sparring, and thinking that the defendant showed promise, undertook to make him a good boxer; that between 1911 and 1914 he made various engagements for the defendant, and paid all his training expenses and found and paid any side stakes; and that it was in these circumstances that an agreement, contained in a letter of January 14, 1914, was entered into between them. The letter was in the following terms:

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London.

To Mr. Bernard Mortimer, Esq. January 14th, 1914.

Dear Sir,—

In consideration of the sum of ten shillings (10s.), and also in consideration of your many services rendered and to be rendered to me, I undertake that you shall have the sole arrangements of matching me for all my boxing contests and engagements during the period of the next seven (7) years, and in making such arrangements for me I undertake that for the consideration as set out above you are to benefit to the extent of fifty (50%) per cent. of any purses put up for me above the sum of 25*l.* (twenty-five pounds) and on other music hall or other engagements you are to receive also a sum of 50% (fifty per cent.). I acknowledge to have received from you during the past five years monetary assistance and you have arranged and procured boxing matches for me, and I understand and have had this letter read and explained by Arthur F. Bettinson, of the National Sporting Club, Covent Garden.

Witness,
L. W. Penn,
43, King Street,
Covent Garden,
W.C. 1.

I am,
Yours faithfully,
JOE BECKETT.

Received the sum of ten shillings (10s.).

The plaintiff continued to act for the defendant in arranging engagements until December 20, 1919, when the defendant wrote to him to say that he had decided for the future that he would arrange his own affairs, as he found that the present business relationship had a tendency to prevent him from putting his best efforts into his work. The plaintiff replied on December 29 pointing out that the defendant was bound by agreement for seven years from January 14, 1914, and claiming payment of considerable sums alleged to be owing to him in respect of training expenses, borrowed money, and his share under the agreement of purses received in connexion with boxing contests and of sums earned in music

hall and other engagements. The defendant denied that he had ever entered into the agreement of 1914, and alleged that the only agreement he had ever entered into with the plaintiff was made in 1911, and was less favourable to the plaintiff.

In these circumstances, the plaintiff issued a writ on January 17, 1920, claiming payment of a sum of 2905*l.* said to be due to him, alternatively an account, and an injunction. On January 19, 1920, the plaintiff gave notice of motion for an injunction until judgment or further order to restrain the defendant from entering into or agreeing to enter into any boxing contest or making or carrying out any engagement as a professional boxer other than such contests or engagements as had been, or should be, arranged for him by, or through, the plaintiff.

It was admitted on behalf of the defendant that for the purpose of the motion the agreement of January 14, 1914, must be taken to have been duly entered into by the defendant.

S. H. Emanuel K.C. and *Northcote* for the plaintiff. The plaintiff is entitled to the protection of an injunction pending the hearing in view of the defendant's agreement to employ him as his "sole" agent.

Maugham K.C. and *Sheldon* for the defendant. This is an agreement for personal services, of which the Court will not grant specific performance, either by injunction or otherwise. The document is silent as to what the plaintiff's duties are, so that the contract lacks mutuality. It is a contract by the defendant to employ the plaintiff for his sole agent in arranging boxing engagements for seven years without any corresponding obligations of the plaintiff being defined. Further, the contract is not enforceable by injunction, because it is a purely affirmative agreement, except in so far as a negative stipulation not to employ anyone else can be inferred from the word "sole." Therefore there is no independent negative stipulation, and accordingly the Court will not grant an injunction: *Lumley* v. *Wagner* (1);

(1) 1 D. M. & G. 604.

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Whitwood Chemical Co. v. *Hardman* (1); *Davis* v. *Foreman* (2); and *Kirchner & Co.* v. *Gruban.* (3)

S. H. Emanuel K.C. in reply. The agreement is that the plaintiff is to have the arrangement of matches, and this imposes on him correlative duties, such, for instance, as putting up side stakes. Further, the agreement compels the defendant to fight no one but provides that, if he is going to make his living by boxing, the plaintiff is to have the sole right to make engagements for him. This case is not like *Lumley* v. *Wagner* (1), for it is the agent to be employed who is seeking the injunction. Further, there is in substance a negative stipulation not to employ any other agent.

RUSSELL J. This is an action in which the plaintiff Mortimer sues the defendant Joe Beckett in respect of an agreement dated January 14, 1914, and by the notice of motion he asks for an injunction to restrain the defendant until judgment or further order from entering into or agreeing to enter into any boxing contest or making or carrying on any engagement as a professional boxer other than such contests or engagements as had been or should be arranged for him by or through the plaintiff. The document in question was signed by the defendant when he was between twenty-one and twenty-two years of age; it is in the form of a letter addressed to the plaintiff, and is in these terms. [His Lordship read the agreement.] There are certain issues raised on affidavit relating to the circumstances of the signature of the document, and whether the document, as signed, represented the effect of the document as explained to the defendant, a comparatively illiterate individual. I have nothing to do with that at the present time. The motion has been fought on the assumption that it was properly signed, and the other matter can only be dealt with at the trial.

The first thing I have to consider is what the document means. The consideration is ten shillings, a past consideration which may be disregarded, and this: "in consideration of

(1) [1891] 2 Ch. 416. (2) [1894] 3 Ch. 654.
(3) [1909] 1 Ch. 413.

your many services . . . . to be rendered to me." There is nothing more definite as regards the plaintiff's services, and accordingly nothing more definite is enforceable against him. In my opinion, therefore, the agreement lacks mutuality. The defendant, on the other hand, agrees during the specified period of seven years to employ the plaintiff and no one else as his agent to enter into contracts for his appearance in the ring, and as a reward the plaintiff is to receive 50 per cent. of any purses put up above the sum of 25*l.* and of the earnings in any music hall or other engagements.

The question I have to consider is whether on a document of that kind the Court will grant an injunction, and to that extent grant specific performance of the contract. It is an agreement for personal services, an agreement to employ the plaintiff as the sole agent for the defendant, and the defendant binds himself to accept those services and to employ him as sole agent. The authorities which have been cited support the view that the Court will not grant an injunction upon such a contract as this, but will leave the plaintiff to his common law remedy in damages. The first case is *Lumley* v. *Wagner* (1), which came before Lord St. Leonards on appeal from Sir James Parker, and is a case of high authority. In that case Miss Wagner had agreed to sing at a particular theatre during a particular period and for the performances specified, and down to the tenth clause of the agreement there was no independent negative clause to the effect that she would not perform anywhere else. Lord St. Leonards came to the conclusion that down to this clause the agreement did involve a contract to sing at the theatre at these performances, and at no other, but that in order that the agreement should be enforceable by injunction there must be an independent negative stipulation that she would perform nowhere else. But there was an added independent clause, and Lord St. Leonards, although he had come to the conclusion that in the absence of such an express independent negative stipulation he would not grant an injunction, granted it on finding that independent

(1) 1 D. M. & G. 604.

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negative stipulation. I will read a few passages from his judgment. He says (1): "The present is a mixed case, consisting not of two correlative acts to be done, one by the plaintiff and the other by the defendant, which state of facts may have and in some cases has introduced a very important difference,—but of an act to be done by J. Wagner alone, to which is suspended a negative stipulation on her part to abstain from the commission of any act which will break in upon her affirmative covenant—the one being ancillary to, concurrent and operating together with the other. The agreement to sing for the plaintiff during three months at his theatre, and during that time not to sing for anybody else, is not a correlative contract, it is in effect one contract; and though beyond all doubt this Court could not interfere to enforce the specific performance of the whole of this contract, yet in all sound construction, and according to the true spirit of the agreement, the engagement to perform for three months at one theatre must necessarily exclude the right to perform at the same time at another theatre. It was clearly intended that J. Wagner was to exert her vocal abilities to the utmost to aid the theatre to which she agreed to attach herself. I am of opinion, that if she had attempted, even in the absence of any negative stipulation, to perform at another theatre, she would have broken the spirit and true meaning of the contract as much as she would now do with reference to the contract into which she has actually entered." Then a little later he says: "It was objected that the operation of the injunction in the present case was mischievous, excluding the defendant J. Wagner from performing at any other theatre while this Court had no power to compel her to perform at Her Majesty's Theatre. It is true, that I have not the means of compelling her to sing, but she has no cause of complaint if I compel her to abstain from the commission of an act which she has bound herself not to do, and thus possibly cause her to fulfil her engagement." Further on in his judgment he referred to *Clarke* v. *Price* (2), which had been pressed

(1) 1 D. M. & G. 618. (2) (1819) 2 Wils. 157.

on him by the defendant's counsel, and said (1): "That is a case which does not properly belong to their argument, because there there was no negative stipulation, and I quite admit that this Court cannot enforce the performance of such an affirmative stipulation as is to be found in that case." Then Lord St. Leonards stated the effect of that case: "There the defendant having agreed to take notes of cases in the Court of Exchequer, and compose reports for the plaintiff, and having failed to do so, the plaintiff, Mr. Clarke, filed a bill for an injunction, and Lord Eldon, when refusing the injunction, in effect said: I cannot compel Mr. Price to sit in the Court of Exchequer and take notes and compose reports; and the whole of his judgment shows that he proceeded (and so it has been considered in later cases) on the ground that there was no covenant, on the part of the defendant, that he would not compose reports for any other person." A little later he says: "Lord Eldon therefore was of opinion, upon the construction of that agreement, that it would be against its meaning to affix to it a negative quality and import a covenant into it by implication, and he therefore, very properly as I conceive, refused that injunction; that case, therefore, in no respect touches the question now before me, and I may at once declare, that if I had only to deal with the affirmative covenant of the defendant J. Wagner that she would perform at Her Majesty's Theatre, I should not have granted any injunction." Therefore, although there Lord St. Leonards treated the first ten clauses of the agreement as implying a negative provision yet he said that he would not have granted an injunction if there had not been an independent negative stipulation. That case was considered in *Whitwood Chemical Co.* v. *Hardman*. (2) There the manager of a manufacturing company agreed to give during a specified time "the whole of his time to the company's business." The agreement was positive in form, but it involved a negative stipulation not to give any of his time to anyone else. Kekewich J. granted an injunction, and the matter went to the Court of Appeal, and the Court of Appeal held (reversing

(1) 1 D. M. & G. 622. (2) [1891] 2 Ch. 416.

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the decision of Kekewich J.) that in the absence of any negative stipulation in that behalf, the company was not entitled to an injunction to restrain the manager from giving, during the term, part of his time to a rival company. The matter was gone into by Lindley L.J. at considerable length. He said (1): "The first point to observe is, that there is no negative covenant at all, in terms, contained in the agreement on which the plaintiffs are suing—that is to say, the parties have not expressly stipulated that the defendant shall not do any particular thing. The agreement is wholly an affirmative agreement, and the substantial part of it is that the defendant has agreed to give 'the whole of his time' to the plaintiff company. That is important in this respect, that it enables us to see more clearly than we otherwise might what the parties had in their contemplation. If there had been a negative clause in this agreement, such as there was in *Lumley* v. *Wagner* (2), and in some of the other cases, we should have been relieved from the difficulty of speculating what they had been thinking about. We should have seen that they had their attention drawn to certain specific points, and that they had come to an agreement upon those specific points. In this case, we are left more or less in the dark about that, because, as I have said, there is nothing that shows that anything definite was in the minds of these parties beyond this, that the defendant was to give the whole of his time to the plaintiff's business. Now every agreement to do a particular thing in one sense involves a negative. It involves the negative of doing that which is inconsistent with the thing you are to do. If I agree with a man to be at a certain place at a certain time, I impliedly agree that I will not be anywhere else at the same time, and so on ad infinitum; but it does not at all follow that, because a person has agreed to do a particular thing, he is, therefore, to be restrained from doing everything else which is inconsistent with it. The Court has never gone that length, and I do not suppose that it ever will. We are dealing here with a contract of a particular class. It is a contract involving the performance of a personal

(1) [1891] 2 Ch. 426. (2) 1 D. M. & G. 604.

service, and, as a rule, the Court does not decree specific performance of such contracts. That is a general rule. There has been engrafted upon that rule an exception, which is explained more or less definitely in *Lumley* v. *Wagner* (1) —that is to say, where a person has engaged not to serve any other master, or not to perform at any other place, the Court can lay hold of that, and restrain him from so doing." Then comes a passage which causes me some trouble. The learned Lord Justice says that he agrees with some observations of Lord Selborne in *Wolverhampton and Walsall Ry. Co.* v. *London and North Western Ry. Co.* (2), "to the effect that the principle does not depend upon whether you have an actual negative clause, if you can say that the parties were contracting in the sense that one should not do this, or the other—some specific thing upon which you can put your finger." If by this Lindley L.J. meant that this Court could grant an injunction when there was no independent negative stipulation, his view is contrary to what was said in *Lumley* v. *Wagner* (1) and what he himself went on to say at the end of his judgment (3): "But there is this to be considered. What are we to say in this particular case? What injunction can be granted in this particular case which will not be, in substance and effect, a decree for specific performance of this agreement? It appears to me the difficulty of the plaintiffs is this, that they cannot suggest anything which, when examined, does not amount to this, that the man must either be idle, or specifically perform the agreement into which he has entered. Now there, it appears to me, the case goes beyond *Lumley* v. *Wagner* (1), and every case except *Montague* v. *Flockton* (4). The principle is that the Court does not decree specific performance of contracts for personal service, and the question is, whether there is anything in this case which takes it out of that principle." Then he discusses *Montague* v. *Flockton* (4), and says: "Malins V.-C. did go to the length of restraining an actor from performing at a rival theatre, although there was no stipulation

(1) 1 D. M. & G. 604.
(2) (1873) L. R. 16 Eq. 433.
(3) [1891] 2 Ch. 427.
(4) (1873) L. R. 16 Eq. 189.

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on his part, in terms, that he would not do so; and, with great deference to the learned judge, I must say I think he arrived at that conclusion owing to a misunderstanding of *Lumley* v. *Wagner*. (1) I cannot read the decision of Malins V.-C. without seeing that he was under the impression that Lord St. Leonards in *Lumley* v. *Wagner* (1) would have granted the injunction, even if the negative clause had not been in the contract. This was a mistake. Lord St. Leonards was very clear and explicit on that subject. He said distinctly he would not have done it in the absence of that negative clause, but he did go on to say in other parts of his judgment that in the absence of that negative clause there would have been a breach of the agreement. That is true enough, and Malins V.-C., I think, was under the impression that Lord St. Leonards intended to intimate not only that there would be a breach of the agreement, but that the remedy of injunction would be granted in the absence of that negative clause, which is not in accordance with the judgment in *Lumley* v. *Wagner* (1) as I understand it." I do not see how to reconcile this with the earlier passage I have read. Then Lindley L.J. continues a little further on: "I agree with what the late Master of the Rolls, Sir G. Jessel, said about there being no very definite line. I agree, also, in what Fry L.J. has said more than once, that cases of this kind are not to be extended. I confess I look upon *Lumley* v. *Wagner* (1) rather as an anomaly to be followed in cases like it, but an anomaly which it would be very dangerous to extend"—that is, to be followed in cases like it when there is a clear express negative stipulation—"I make that observation for this reason, that I think the Court, looking at the matter broadly, will generally do much more harm by attempting to decree specific performance in cases of personal service than by leaving them alone; and whether it is attempted to enforce these contracts directly by a decree of specific performance, or indirectly by an injunction, appears to me to be immaterial." Kay L.J. in the same case said (2): "However, what strikes me in this case is that if the Court could

(1) 1 D. M. & G. 604. (2) [1891] 2 Ch. 432.

possibly interfere in the way in which the learned judge has interfered, by injunction, I do not see any contract of hiring and service in which it ought not also to interfere. To take the most simple and ordinary case, of a man's domestic servant, his butler (which was one of the cases put by way of illustration in one of the judgments referred to), who has contracted to give the whole of his time to his master's service. Could it possibly be argued that an injunction could be obtained to prevent his serving someone else during that engagement? Yet if a negative is to be implied, I do not see any case whatever in which it could be more clearly implied than in a case of that kind."

Two subsequent cases have been cited, *Davis* v. *Foreman* (1), which came before Kekewich J., and *Kirchner & Co.* v. *Gruban* (2), which came before Eve J. Those cases only go to this, that there may be instances of clauses which, prima facie, appear negative in form, but are in substance affirmative; and in those two cases the learned judges declined on this ground to grant injunctions. It was said that the clauses were negative, but the judges found they were in fact affirmative, and therefore not within *Lumley* v. *Wagner*. (3) I would point out however that *Davis* v. *Foreman* (1) was (like the present case) a case where the agent was seeking to insist on his employment being continued.

Applying these authorities to the case before me, if I grant an injunction here, the effect will be to force the defendant to employ a particular person as his agent so far as his boxing engagements are concerned, and to accept that agent's services. Therefore I should to that extent be granting specific performance of a contract for personal services. The contract is not negative save so far as a negative stipulation can be inferred from the word "sole." It is, therefore, positive in form, and there is no independent negative stipulation to bring the case within *Lumley* v. *Wagner* (3) and *Whitwood Chemical Co.* v. *Hardman*. (4) I hold, therefore, that no injunction ought to be granted.

(1) [1894] 3 Ch. 654.
(2) [1909] 1 Ch. 413.
(3) 1 D. M. & G. 604.
(4) [1891] 2 Ch. 416.

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There is another ground on which I think I should be exercising a wise discretion in refusing an injunction. The contract is very peculiar in form. It is impossible to put one's finger on anything which the plaintiff is bound to do. The only consideration is 10s., past services, and a vague reference to future services which are in no way defined so that it is impossible to predicate what would be a breach by the plaintiff of the contract. It is, therefore, lacking in mutuality, and on that ground also I think I should be unwise to grant an injunction pending the trial. The motion must therefore be dismissed.

Solicitors: *Nicholls & Co., for C. A. Emanuel & Emanuel, Southampton; Lowe & Co., for A. H. Emanuel, Southampton.*

H. C. G.

P. O. LAWRENCE J. 1920 *Feb.* 12, 13, 18; *March* 3.

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POLE'S CASE.

[1920. O. 8.]

Company—Underwriting Contract—Sub-underwriting Contract—Authority to apply for Shares—Authority coupled with an Interest—Irrevocable Authority—Application to rectify Register of Shareholders—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 32.

By an underwriting contract dated December 3, 1919, a syndicate agreed with a company in consideration of a commission and other moneys to subscribe for 150,000 of the 350,000 shares to be offered for public subscription by a prospectus then immediately to be issued, and all allotments of shares to the public were to be applied in relief of the obligation of the syndicate to take up the 150,000 shares.

In anticipation of this underwriting contract the syndicate on December 1 procured sub-underwriting letters to be signed by various persons, of whom P. was one. By his sub-underwriting letter P. agreed with the syndicate to subscribe for 10,000 of the 150,000 shares on the terms of the prospectus to be issued to the public, and stated (clause 1)

"we now hand you application for the shares hereby underwritten by us together with cheque of 1250*l.* being deposit of 2*s.* 6*d.* per share." Clauses 2 to 4 provided that P. was only to be allotted and to pay for so many of the 10,000 shares as should be his due proportion of shares not taken up by the public, and that he was to be paid a commission on the shares sub-underwritten by him. Clause 5 was: "This contract and our said application shall, notwithstanding any withdrawal on our part and/or any repudiation of our responsibility hereunder, or under the said application form, be sufficient to authorise and empower the directors to allot to us the above-mentioned shares and enter our name in the register of members in respect thereof."

P. did not however sign or hand to the syndicate any written application to the company for the 10,000 shares as contemplated by his sub-underwriting letter, nor did he himself make any application to the company for the shares, but handed his sub-underwriting letter to the syndicate with his cheque of 1250*l.* in their favour. The prospectus was issued and only 55,000 shares were taken up by the public, and on December 12 the syndicate verbally applied in their own name and in the names of the several sub-underwriters (including P.) to the company for an allotment of the total amount of shares they were bound to take up and paid with their own cheque for the total amount of the application money. The same day the company went to allotment and allotted P. 6334 shares, being his due proportion of the 10,000 shares under his sub-underwriting letter. On December 22, P. wrote the company withdrawing his application for shares (meaning his sub-underwriting letter), but the company on December 29 sent him the usual formal notice of the allotment of the 6334 shares. On motion by P. to rectify the register of members of the company by removing his name therefrom as the holder of 6334 shares and for repayment of the 1250*l.* on the ground that there never was any contract between himself and the company to take the shares:—

Held, on the evidence, that the parties to the sub-underwriting contract waived the stipulation that P. should hand the syndicate a written application by him for the shares, and authorized them to apply for shares in his name and on his behalf, and the fact that they made a verbal and not a written application on his behalf was immaterial.

Held, also, that the general rule, that an applicant for shares can withdraw his application at any time before he receives notice of allotment, did not apply, as P. had given a continuing and irrevocable authority to the syndicate to apply for the shares in his name and on his behalf which he could not withdraw.

The principle of *Carmichael's Case* [1896] 2 Ch. 643 applied.

MOTION.

Towards the latter end of 1919 the Angel Court Trust, Ld. (hereinafter called the Trust) arranged to bring out the company which was then about to be formed for the purpose of transacting fire, accident and marine reinsurance business. The capital of the company was to consist of 400,000*l.*

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divided into 400,000 shares of 1*l.* each, of which it was intended to offer 350,000 for public subscription immediately after the incorporation of the company. The Trust agreed: (1.) to advance the sum of 20,000*l.* required to be deposited on the registration of the company; (2.) to underwrite 150,000 of the 350,000 shares intended to be offered to the public; and (3.) to pay all the preliminary expenses down to the first general allotment of shares. The company was duly incorporated on December 1, 1919, and the arrangements with the Trust were embodied in an agreement between the company and the Trust dated December 3, 1919, which, after reciting the above-mentioned facts, was as follows: "(1.) The Trust for the consideration below mentioned hereby underwrites 150,000 of the above-mentioned shares so to be offered and now hands to the Company application for the same." Clause 3 provided that if 150,000 shares should be applied for and allotted to the public the Trust were not to be allotted any shares in respect of their application, but if the whole of such 150,000 was not so applied for and allotted then all applications made by the public on which allotments were made were to be applied in relief of the obligation of the Trust to subscribe under their application. Clause 4 provided that if the Trust withdrew their application or failed to hand it to the company, then the company should be at liberty in the name and on behalf of the Trust to sign and put in an application for the number of shares underwritten by the Trust or any less number and to make an allotment in respect thereof and the Trust would pay the application and allotment moneys immediately after receiving notice of allotment. By clause 6 the company agreed to pay the Trust a commission of 3 per cent. in cash and an over-riding commission of 1 per cent. on the nominal value of the shares underwritten. By clause 7, after stating that the Trust had advanced the 20,000*l.* and had procured the registration of the company, the Trust agreed to cause the prospectus to be filed and properly advertised and to pay all the preliminary expenses down to the first general allotment. By clause 8 the company agreed to pay to the Trust a

sum of 12,500*l.* in cash and to repay the 20,000*l.* within seven days after the first general allotment.

In anticipation of the execution of this underwriting agreement the Trust procured a number of sub-underwriting letters to be signed by various persons, of whom Mr. Pole was one. The sub-underwriting letter signed by Mr. Pole was addressed to the Trust and was dated December 1, 1919. Omitting formal parts it was as follows, namely :—

"1. For the consideration below stated we agree to subscribe at par or procure responsible subscribers to your satisfaction for 10,000 shares of 1*l.* each, being part of the shares which are to be offered for subscription, and to pay for the same in the manner and on the conditions and subject to the terms to be named in the Prospectus to be filed with the Registrar of Joint Stock Companies prior to the same being issued to the public under the above title or any modification thereof. We agree to be bound by the terms of such Prospectus notwithstanding any variation between the same and any draft or proof copy thereof produced to us on or prior to our making this Contract. We now hand you application for the Shares hereby underwritten by us, together with cheque for 1250*l.* being deposit of 2*s* 6*d.* per share payable on such shares.

"2. If on or before the closing of the Subscription List, the date and time for which closing the Directors shall determine, there are 150,000 shares of the above issue bona fide and duly applied for by the public, then no allotment is to be made to us in respect of this Contract, and the Company is to return to us our cheque or the proceeds thereof.

"3. If within such time as provided in Clause 2 less than such 150,000 Shares are applied for by the pnblic, then we are only to be allotted not more than our proportion of the deficiency between the amount so subscribed for by the public and such 150,000 Shares, having regard to the proportion which the number of Shares hereby underwritten by us bears to 150,000 Shares.

"4. You are to pay to us a commission of three per cent. in cash upon the total Shares hereby underwritten by us,

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such commission to be payable within fourteen days after payment by us of the moneys (if any) payable on allotment in respect of the Shares allotted to us.

"5. This Contract and our said application shall be irrevocable on our part, and this Contract shall notwithstanding any withdrawal on our part and/or any repudiation of our responsibility hereunder, or under the said application form, be sufficient to authorise and empower the Directors to allot to us the above-mentioned Shares and enter our name on the Register of Members in respect thereof."

This letter was the modern printed form of a sub-underwriting contract, and the use of the plural style in it was explained by the fact that a printed form was utilized which was prepared for signature by a firm or by more than one person. Nothing however turned upon this fact. After Mr. Pole had signed the letter he handed it to the Trust together with a cheque dated December 15, 1919, for 1250*l.* drawn by him in favour of the Trust, and on December 3, 1919, the Trust indorsed their formal acceptance at the foot of the letter. Mr. Pole did not sign or hand to the Trust any written application to the company for the 10,000 shares as contemplated by the sub-underwriting contract; nor did he himself make any application to the company for the 10,000 shares.

The Trust paid Mr. Pole's cheque for 1250*l.* (together with the cheques of the other sub-underwriters) into their own bank.

The prospectus was issued on December 3, 1919, and the subscription list opened on the 5th and closed on December 10, 1919. On December 12, 1919, the Trust wrote a letter to Mr. Pole informing him that the subscription list had been closed and that the total number of shares applied for by the public was 55,000 and that consequently the proportion of shares to be taken up by the underwriters was nineteen-thirtieths of the amount underwritten. The letter then proceeded as follows: "We have passed on your application and cheque in respect of the shares underwritten to the Company who will proceed now to the allotment of

the proportion of shares due to you and the allotment letter will be forwarded in due course." The statement in this letter that the Trust had passed on Mr. Pole's application and cheque to the company was inaccurate. As already stated, Mr. Pole had not signed any application for the 10,000 shares, and the cheque for 1250*l.* had been paid by the Trust into their own bank. What really happened was that on December 16, 1919, the Trust verbally applied in their own name and in the names of the several sub-underwriters (including Mr. Pole) for an allotment of shares amounting altogether to 95,000 in number (being the total amount to be taken up by them as underwriters) and paid to the company the sums of money which they had received from their sub-underwriters (including the 1250*l.* which they had received from Mr. Pole) together with the application money payable by the Trust themselves in respect of the balance of their proportion of the 150,000 shares which had not been sub-underwritten. The total amount so paid by the Trust to the company was paid by one cheque drawn by the Trust on their own bank. The amount of shares thus applied for by the Trust in the name of Mr. Pole was 6334, being the proper proportion (namely, nineteen-thirtieths) of the 10,000 shares under his sub-underwriting contract, which contract was lodged by the Trust with the company at or previously to the time of making the application for the shares. The company thereupon on the same day went to allotment and allotted (inter alia) the 6334 shares to Mr. Pole, entering his name in the register of members of the company as the holder of these shares and crediting him with the sum of 1250*l.* paid up in respect thereof.

On December 18, 1919, Mr. Pole was informed by a Mr. White, whose name had appeared as one of the directors of the company in the preliminary prospectus shown to Mr. Pole before he signed his sub-underwriting letter, that he (Mr. White) was not a director of the company and could not act as such until he had left the Royal Exchange Assurance Corporation. The prospectus which was ultimately issued to the public omitted Mr. White's name from the list

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of directors but stated that he would join the Board at the end of the year (as in fact he did) on his retirement from the Royal Exchange Assurance Corporation. Mr. Pole did not see the final prospectus. On the same December 18, 1919, Mr. Pole was told by one of the directors of the company that the company had gone to allotment. This information astonished Mr. Pole, and on December 22, 1919, his solicitors, by his instructions, wrote to the company giving notice that Mr. Pole "withdraws his application of December 2 to your Company for 10,000 shares therein and that you are not to proceed to allotment to him of any shares under that application or otherwise." They also requested a return of the 1250*l.* The reference in this letter to Mr. Pole's application of December 2 was a mistake and the explanation was that all parties treated the sub-underwriting contract as an application by Mr. Pole to the company for the shares sub-underwritten by him and that the date, December 2, was a clerical error for December 1. This mistake was treated as immaterial. The company did not answer this letter, and on December 29, 1919, they sent to Mr. Pole the usual formal notice of allotment of the 6334 shares with a demand for the payment of the balance of the money payable on allotment. Thereupon on January 2, 1920, Mr. Pole launched a motion under s. 32 of the Companies (Consolidation) Act, 1908, for rectification of the register of members of the company by removing his name therefrom as the holder of 6334 shares and for repayment of the 1250*l.* paid by him in respect of such shares.

Shortly after the motion had been launched Mr. Pole received from the Trust a cheque for 300*l.*, being the amount of the commission payable to him under his sub-underwriting contract. He retained this cheque uncashed for some three or four weeks on the expiration of which period it was paid into his bank without his knowledge by his cashier.

On January 10, 1920, Mr. Pole swore his first affidavit in support of the motion in which the only grounds of complaint alleged were, first, that he was induced to subscribe

for the shares on the faith of the representation (which in fact was untrue) that Mr. White was a director of the company; and secondly, that he was unaware of the small amount of the nominal and issued capital of the Trust. In this affidavit he treated himself as having subscribed for the 6334 shares in the company and spoke of "my application" for such shares. It was not until his affidavit in reply on January 28, 1920, that he for the first time raised the point that he had signed no application form for the 6334 shares and that he had signed no document authorizing the Trust to apply in his name for an allotment of the shares. In February, 1920, Mr. Pole attended a general meeting of the company at which he asked a question but did not vote.

Mr. Pole in cross-examination on his affidavit stated that he never thought of withdrawing from the company until he saw Mr. White.

Owen Thompson K.C. and *C. A. Bennett* for the motion. In the first place, there never was an offer by Mr. Pole or by any agent on his behalf to take shares in the company, either verbal or in writing. He did not sign any application form, nor did the Trust make any application in writing to the company on his behalf. The company may rely on *Carmichael's Case* (1) but it is distinguishable. In that case an application form was signed, and in *In re Henry Bentley & Co.* (2) authority was given to apply in the name and on behalf of the sub-underwriter. Those cases are decisions in the forms of underwriting contracts given in Palmer's Company Precedents, 11th ed., vol. i., pp. 300, 302, which do not contain a clause like clause 5 in the present case. But the Olympic directors cannot take advantage of clause 5, because there is no privity of contract between Pole and the company, nor does clause 5 constitute the Trust his agents to apply for shares. It is only a contract between him and them that he will apply for shares, and he may be liable to them in damages for breach of contract. The

(1) [1896] 2 Ch. 643. (2) (1893) 69 L. T. 204.

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authorities show that there must be an offer by a principal or by his agent: Buckley on Companies, 9th ed., p. 56; but Mr. Pole never applied personally nor signed any document authorizing the Trust to apply on his behalf, and the company cannot take advantage of his offer to the Trust to subscribe for shares. The Trust were not agents of the company to accept applications for shares: *Wallis' Case.* (1) The words "my said application" in clause 5 mean "my application form to the company for shares" which is to be irrevocable. The clause was not an irrevocable mandate by Mr. Pole to the Trust to apply for shares on his behalf. Secondly, if the true inference from the facts is that a verbal offer was made on his behalf by the Trust on December 16, allotment was acceptance of the offer, but the onus is on the company to prove notice of the allotment: *Reidpath's Case* (2); and it is settled that an offer can always be withdrawn before notice of allotment is received: *Hebb's Case.* (3) Here Mr. Pole withdrew his offer on December 22, and notice of allotment was not sent to him until December 29.

Ward Coldridge K.C. and *J. F. Carr* for the company. Mr. Pole signed the sub-underwriting contract for valuable consideration—namely, a commission of 3 per cent.—and agreed to relieve the Trust to the extent of 10,000 shares in respect of their obligations under their underwriting contract. On clause 5 of his letter and the facts he could not withdraw. It was an authority coupled with an interest within the principle of *Carmichael's Case.* (4) Clause 5 is a development of the old form of a sub-underwriting contract in Palmer's Company Precedents, 11th ed., vol. i., p. 302, which was found to be insufficient. A verbal request for shares is sufficient: *Cookney's Case.* (5) But the parties here did in fact waive a separate application for shares and treated the sub-underwriting letter itself as an irrevocable authority to apply for the shares, and on its production by the Trust to the company coupled with a verbal request for the shares created

(1) (1868) L. R. 4 Ch. 325*n*.
(2) (1870) L. R. 11 Eq. 86.
(3) (1867) L. R. 4 Eq. 9.
(4) [1896] 2 Ch. 643, 648.
(5) (1858) 3 De G. & J. 170.

a priority between Mr. Pole and the company and was a sufficient and irrevocable authority to the directors to allot him his due proportion of the shares.

Owen Thompson K.C. in reply.

Cur. adv. vult.

March 3. P. O. LAWRENCE J. stated the facts and continued: In these circumstances it is contended on behalf of Mr. Pole that there never was any contract between himself and the company to take the 6334 shares, first, because he neither applied for them himself nor authorized the Trust to apply for them on his behalf; and secondly, because even if the application made by the Trust on his behalf was equivalent to an application by himself he caused such application to be withdrawn before he received notice of allotment and consequently no contract to take the shares resulted.

Before dealing with these contentions I desire to state that I attach no importance to the cashing of the cheque for 300*l.* nor to Mr. Pole's attendance at the shareholders' meeting in February. Both these events took place after the proceedings for rectification had been commenced, and I hold as a fact that Mr. Pole did not intend thereby to waive any right he may have had on January 2, 1920, to have his name removed from the register of members. I also desire to add that any claim for relief founded on the alleged misrepresentation as to Mr. White was expressly abandoned by Mr. Owen Thompson in his opening, and that no point was made as to the alleged lack of capital of the Trust.

Dealing now with the first point made at the hearing on behalf of Mr. Pole I am clearly of opinion that the true inference to be drawn from the facts which I have stated is that the parties to the sub-underwriting contract waived the stipulation therein contained that Mr. Pole should hand to the Trust a written application by him for the shares and that in lieu of such written application Mr. Pole authorized the Trust to apply for the shares in his name and on his behalf. I draw this inference mainly from the fact that with the

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sub-underwriting letter Mr. Pole handed to the Trust his cheque for the application money. The handing of this cheque to the Trust could in my judgment have no other meaning than that the Trust were to apply the proceeds of it in paying to the company the application moneys for the 10,000 shares, which in turn involved an application to the company for these shares being made by the Trust on Mr. Pole's behalf. That this was the true nature of the arrangement is I think amply corroborated by the Trust's letter of December 12, 1919, by Mr. Pole's solicitor's letter of December 22, 1919, by Mr. Pole's affidavit of January 10, 1920, and by Mr. Pole's statements made on cross-examination. Moreover it is worthy of remark that in his affidavit of January 28, 1920, Mr. Pole is careful not to say that he did not authorize the Trust to apply for the shares on his behalf but only that he never signed any document authorizing the Trust to apply in his name for an allotment of the shares. In truth, until Mr. Pole realized that he could not hope to succeed on his motion on the ground that he had been misled as to Mr. White's position it never occurred to him to question the Trust's application for the 6334 shares on his behalf which application he treated as if it had been his own up to the time of swearing his affidavit in reply. In the circumstances I have no hesitation in holding that the Trust had ample authority to apply to the company in the name and on behalf of Mr. Pole for the allotment to him of the 6334 shares. The fact that the Trust made a verbal and not a written application on his behalf is immaterial, as it is conceded that a contract to take shares stands on the same footing as any other contract and that a verbal application is as effectual to found such a contract as a written application. In the result I hold that the first point made on behalf of Mr. Pole entirely fails.

I now come to the second point—namely, that no contract to take the 6334 shares was ever constituted between the company and Mr. Pole because Mr. Pole withdrew his application before he had received notice from the company of the allotment of the shares. In support of this contention

counsel relied on *Hebb's Case* (1), which decides that an applicant for shares can withdraw his application at any time before he has received notice of the allotment. Although I think that this proposition is established beyond doubt as a general rule and although I am of opinion that Mr. Pole did not receive notice of the allotment of such shares from the company until December 29, 1919, yet it remains to be considered whether the proposition established by *Hebb's Case* (1) applies to the facts of the present case. In order to solve this question it must in my opinion in the first instance be determined what was the extent and nature of the authority conferred by Mr. Pole upon the Trust. In my opinion such authority extended not only to the making of the application but also to the maintenance of the application when made as an effectual application down to the date of its final acceptance by the company. I am further of opinion that this authority was irrevocable. I will state shortly my reasons for coming to the conclusion that this was the true extent and nature of the authority. In the first place the sub-underwriting contract was a contract made by Mr. Pole for valuable consideration. In the next place it was a contract made in partial relief of the obligations then about to be and subsequently in fact undertaken by the Trust towards the company. One of these obligations was to apply for and take up 150,000 shares less any amount subscribed for by the public. To the knowledge of Mr. Pole therefore the Trust, when once they had made an application for their proper proportion of the shares, were not as against the company entitled to withdraw such application. Accordingly, it was one of the essential terms of the sub-underwriting agreement that Mr. Pole should bind himself to the Trust to take up his proportion of the 150,000 shares and that his application for those shares should be irrevocable. Moreover, apart from the fact that the Trust were underwriting 150,000 of the shares about to be offered to the public for subscription, they had a direct interest in the raising of the capital of the company, inasmuch

(1) L. R. 4 Eq. 9.

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as this capital was to provide the money from which the Trust were going to be paid the 20,000*l.* they had advanced and the 12,500*l.* they had expended (or were about to expend) for the preliminary expenses. An additional object of the sub-underwriting contract therefore was to enable the company to perform their contract with the Trust. As we have seen, Mr. Pole, instead of himself making the application as he had agreed to do, arranged that the Trust should make the application on his behalf. In these circumstances I am clearly of opinion that the authority thus given was a continuing authority which could not be revoked by Mr. Pole, and further that Mr. Pole was not entitled to interfere with the Trust's exercise of such authority by withdrawing any application made by the Trust under such authority any more than he would have been entitled to withdraw his own application had he signed and handed such an application to the Trust as contemplated by the sub-underwriting contract. I should have thought that this result would have followed quite apart from para. 5 of the sub-underwriting contract, but the provisions contained in this paragraph in my judgment place the matter beyond doubt. Although the application there mentioned no doubt refers to the application which Mr. Pole was to hand to the Trust yet in my opinion the effect of the agreement to substitute an application by the Trust on Mr. Pole's behalf for an application by Mr. Pole himself is to make the Trust's application take the place of Mr. Pole's application not only for the purposes of para. 1 of the sub-underwriting contract but also for the purposes of para. 5 of this contract. If I am right in this, it follows that there is an express agreement by Mr. Pole not to withdraw the application for shares which the Trust made on his behalf on December 16, 1919. On both these grounds therefore I hold that the authority given to the Trust to make the application for the 6334 shares was a continuing and irrevocable authority and that Mr. Pole was not at liberty to withdraw the application which the Trust had made on his behalf. But then it is argued that even if that be so as between Mr. Pole and the Trust, yet, as the

company is not a party to the sub-underwriting contract, the withdrawal by Mr. Pole of the application is an effectual withdrawal as against the company. The only result of such a withdrawal, it is said, is that it exposes Mr. Pole to a claim on the part of the Trust for damages for breach of contract. I think that it is at least doubtful whether in the circumstances of this case the Trust could if they had been so minded have rendered the withdrawal effectual as against the company by electing to recognize it as valid and trusting to their remedy in damages against Mr. Pole. But even if the Trust could have adopted that course I am of opinion that it was not the only course open to them. In my judgment the Trust could, as they did in fact, elect to hold Mr. Pole to his bargain and treat, and insist on the company treating, the withdrawal as wholly inoperative and void. The company knew of the sub-underwriting contract which was lodged with them at the time of making the application for the shares and they also knew that the purported withdrawal by Mr. Pole of the application was not authorized or recognized by the Trust. In these circumstances the company could I think have been compelled by the Trust to complete the contract with Mr. Pole and were in my opinion fully justified in ignoring the attempted withdrawal of December 22, 1919.

In the result I hold that *Hebb's Case* (1) is inapplicable to the facts of this case, and that the notice of allotment given by the company on December 29, 1919, was effectual to complete the contract by Mr. Pole to take the 6334 shares notwithstanding the attempted withdrawal of his application on December 22, 1919. In my judgment this case is covered in principle by the decision of the Court of Appeal in *Carmichael's Case.* (2) To borrow the language used in that case by Lindley L.J., can it in the circumstances of this case be said in the language of s. 32 of the Companies (Consolidation) Act, 1908, that "the name of Mr. Pole is without sufficient cause entered in the register of

(1) L. R. 4 Eq. 9. (2) [1896] 2 Ch. 643, 648.

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members"? It appears to me that there is ample cause. The motion consequently fails and will be dismissed with costs.

Solicitors for the applicant: *E. O'Connor & Co.*
Solicitors for the company: *Churchill, Smallman & Co.*

H. L. F.

SARGANT J. 1919 *Oct.* 14.

In re PACKARD.

PACKARD *v.* WATERS.

[1919 P. 406.]

Will—Legacy subject to Condition Precedent—Condition to execute Settlement within a fixed Time—Failure to perform through Ignorance of the Condition—Absence of Gift Over—Effect of Gift of Residue.

A testator, who died in 1899, gave his daughter a pecuniary legacy upon the express condition that she should within a year of his death settle upon certain trusts of the will a sum to which she was entitled under a deed of settlement. There was no gift over in case of failure to perform the condition, or direction that in that case the legacy should fall into residue, although the residuary estate was given in trust for the daughter and three other persons. In 1905 an insufficient settlement was executed in intended performance of the condition, but the income had been paid as it would have been if there had been a settlement. The corpus was intact, and the daughter was willing to execute a proper settlement:—

Held, that, assuming the condition was a condition precedent, the limit of time was not of the essence or substance of the condition, which would be sufficiently complied with by the daughter's execution of a proper settlement within the year.

THE testator, Edward Packard, was twice married. He had several children by his first marriage, and he had only two children by his second wife, one being a son who died an infant in 1882 and the other being the defendant, Alice E. Waters, then Alice Elizabeth Packard. Under a settlement, made on August 11, 1868, a sum of 5000*l.* was

settled which, subject to her mother's life interest, vested in Alice E. Waters. Under another settlement, made on March 23, 1874, the testator in the first place conveyed property to secure the payment of the sum of 5000*l.* settled by the settlement of 1868, and in the second place, provided that, after the payment of that sum, the residue of the proceeds of sale of the property then to be sold, should be divided, subject to the testator's appointment by deed or will, amongst his children.

The testator died on October 27, 1899, having by his will, dated August 23, 1895, appointed Edward Packard, H. W. Packard and Charles Cheston executors and trustees thereof, and, after giving some pecuniary and specific legacies and devising certain lands, and reciting the settlement of 1868 and that his daughter "Alice Elizabeth Packard is at present entitled (on the decease of the survivor of myself and my said wife) to the sum of 5000*l.* by the said indenture covenanted to be paid by me to the trustees thereof." The testator gave all his residuary estate to his trustees upon trust for conversion, and to invest a sufficient part thereof to produce a specified income for his widow. And he directed that, "subject as aforesaid" the trustees should hold the residuary estate upon trust to pay a son 10,000*l.* and to pay the trustees of each of two other daughters' settlements (such daughters being Mary Cheston, the wife of Charles Cheston, and Henrietta Ellen Mack) the sums of 5000*l.* and 4000*l.* respectively, to be held upon the trusts of those settlements. The will then provided as follows: "And to pay to my daughter, Alice Elizabeth Packard (but only on the condition hereinafter mentioned) such a sum as, together with the sum of 5000*l.* to which she is entitled under the said recited settlement of August 11, 1868, and any other sums which I may hereafter advance to her or for her benefit, will make up the sum of 10,000*l.* . . . .

"I direct that my trustees shall hold my residuary personal estate upon trust to divide the same equally among my said son Osborne Burgess Packard and my said daughters Mary Cheston, Henrietta Ellen Mack, and Alice Elizabeth Packard,

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in equal shares: Provided always and I declare that the legacy of 5000*l.* and the bequest of part of my residuary personal estate to my daughter Alice Elizabeth Packard are made upon the express condition that she shall within one year of my death settle or cause to be settled the sum of 5000*l.* to which she is entitled under the said settlement of August 11, 1868, and the share which I have appointed to her of the funds subject to the settlement of March 23, 1874, upon such trusts as are hereinafter declared of the provision made for her by this my will. And I direct my trustees to stand possessed of the legacy hereinbefore bequeathed to my daughter Alice Elizabeth Packard and of her share in my residuary personal estate (if by compliance with the last clause she becomes entitled thereto)" upon certain trusts which, shortly stated, were the usual settlement trusts, under which she took a life interest, subject to which the corpus was settled upon her children, if any, and, in default of any children attaining twenty-one years of age, to such persons as she should by will or codicil direct. Later on the will provided that if a settlement should be made on the marriage of Alice E. Packard it should be lawful for the testator's trustees to hand over the legacy of 5000*l.* and her share in the residue to the trustees of that settlement.

No further sum was advanced by the testator to Alice Elizabeth Packard, so that there was in effect a legacy to her of 5000*l.* Alice E. Waters (then Alice E. Packard) was never clear from the conditions imposed by the will of the testator. She left everything, as did the other members of the family, in the hands of a firm of solicitors in which Charles Cheston was a partner, and they managed the estate generally, but in the year 1905 her mother became aware of the condition in the will as to a settlement and wrote to Charles Cheston suggesting that in view of the condition it would be desirable that a settlement should be made and that the condition should be complied with. On that, Charles Cheston sent a letter in reply rather pooh-poohing the doubts that had been raised; but, on being pressed, he said he thought that the settlement might as well be made,

and accordingly he drew up a settlement to be executed by Alice E. Packard, and she, without the least demur, on October 21, 1905, executed the settlement in the form in which he drew it. This settlement was very hurriedly drawn, and it did not strictly comply with the directions which were contained in the will; it did not cover one of the items that the lady was directed to settle, and was in other ways ineffective. As the Court found, it was a very poor document and did not effectually comply with the conditions of the will.

On December 1, 1909, Alice Elizabeth Packard married Basil E. M. Waters, and her mother died on August 16, 1918. Ever since the death of the testator the legacy of 5000*l.*, and the share of residue, had been treated as if a settlement such as was directed by the will had been executed. No such settlement had ever been made by Mrs. Waters, so that, although no proper settlement was in fact executed, the disposition of the income from the property had been in accordance with the directions given in the will of the testator. Down to the commencement of the present proceedings there had been no question about the disposition of the corpus.

Mrs. Waters was perfectly willing to execute a proper supplementary document for the purpose of giving effect to the conditions prescribed by the will.

Edward Packard, the surviving trustee and executor of the will of the testator, Edward Packard, deceased, took out an originating summons against Alice Elizabeth Waters, Henrietta Ellen Mack and Marjorie Nellie Dixon, a trustee of Mrs. Mack's marriage settlement, for the determination of the question (1.) whether, on the construction of the will of the testator and in the events which had happened, Alice E. Waters had by executing the settlement of October 21, 1905, complied with the condition in the will with reference to the legacy of 5000*l.* and one-fourth of the residue given by the will so as to entitle her to the legacy and share of residue; and (2.) whether the legacy ought to be treated as having failed and the bequest of the share of residue ought to be

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treated as undisposed of by the will, or whether it was still competent to Alice E. Waters in any way to comply with the condition.

Nicholson Combe for the plaintiff stated the facts and the questions involved.

Beebee for the defendants Mrs. Waters and Mrs. Mack. The law is clearly stated in Roper on Legacies, 4th ed., pp. 767–770, where the author says: "Where a condition is precedent, it ought regularly to be strictly performed in the manner required, ... yet it seems, that both by the civil law and by our own, if the testator's intention be satisfied by an execution in substance, i.e., cy près, the performance will be sufficient." Then he says that the civil law held, "inconsistently . . . . with its admitted exceptions to the general rule of strict performance . . . . that where 100*l.* was given to B. if he paid C. 20*l.* within a certain period, and C. died before the time, payment to his executors upon the day would be insufficient. It seems, however, that the common law would not require such a literal performance of the condition, but permit the execution of it cy près, viz., by allowing payment of the 50*l.* (*sic*) to C.'s executors to be a good performance; and it is presumed that a Court of equity would hold the same doctrine. Upon a similar principle with that of cy près performance the civil law has admitted of a very extensive limitation to its general rule of strict performance, viz., in all cases where it is apparent that testators paid more regard to the *end* or fulfilment of the condition than to the means prescribed for the execution." He instances the case of a legacy by A. to B. if B erected a monument for A. within three days after A.'s death, in which case B. would be entitled to the legacy if he put up the monument within a reasonable time, and presumes that "Courts of equity would act upon the same principle in similar cases." Then several cases are referred to: *Simpson* v. *Vickers* (1), where non-execution of a release within a prescribed time was held not to be fatal

(1) (1807) 14 Ves. 341.

to the receipt of a legacy if the release was subsequently entered into : *Taylor* v. *Popham* (1), which was a similar decision as to a release : *Paine* v. *Hyde* (2), where nonpayment of debts within the prescribed time was held insufficient to avoid the legacy. Then the author says : " Such determinations as the last upon precedent conditions do not appear to be founded upon relief against forfeiture, ... but upon the principle of their having been *substantially* performed within the meaning of the testator's imposing them." Then he says that " when there is a limitation over of the legacy on noncompliance with its specific terms . . . . a strict and literal performance " is " required," and he refers to *Hollinrake* v. *Lister* (3) as to the distinction made in favour of the noncomplying legatee where there is no gift over. In a case like this, where there is no gift over, time is not of the essence of the condition. The sole object of the condition is that Mrs. Waters shall execute a settlement and this she is prepared to do. It is not clear that the condition here is a condition precedent ; but, assuming that it is, her case is within the authorities referred to in Roper on Legacies. The Court will not imply a gift over, and a mere gift of residue is not a gift over : *Wheeler* v. *Bingham*. (4) [He also referred to *Lloyd* v. *Branton* (5) and *In re Grove*. (6)]

C. Johnston Edwards for the trustees of Mrs. Mack's settlement. The condition here is a condition precedent, and years have passed without its being complied with. It can scarcely be argued that if Mrs. Waters does not comply with the condition her executors can do so. Time is here of the essence of the condition, for otherwise the words " within one year of my death " are not given effect to. The Court has never given relief, so far, in such a case as this.

SARGANT J. (after stating the facts). Mrs. Waters is now perfectly willing to execute a proper supplementary document for the purpose of giving effect to the conditions prescribed

(1) (1782) 1 Bro. C. C. 168.
(2) (1841) 4 Beav. 468.
(3) (1826) 1 Russ. 500,
(4) (1746) 3 Atk. 364.
(5) (1817) 3 Mer. 108.
(6) [1919] 1 Ch. 249.

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by the will, and therefore the question arises whether the term of one year mentioned in the will is really to be treated by the Court as being of the substance of the condition. A question may arise on the words of the will whether the condition is a condition precedent or condition subsequent. On that I do not think it is necessary for me to express an opinion. Mr. Beebee has been content for the purposes of his argument to treat the condition as if it were a condition precedent, and I will deal with the matter upon that footing.

It is to be observed that here there is no gift over to any other person in the event of the condition not being complied with. And it has been laid down in a number of cases, the best of which I think for the present purpose is *Wheeler* v. *Bingham* (1), that a mere residuary gift, without a direction that the legacy or fund in question shall fall into the residue on non-compliance with the condition, is not in itself a gift over to some other person. That being so, it seems to me that the principle to be applied is that which is laid down in Roper on Legacies, 4th ed., p. 767, in the cases which are there referred to. In most of those cases the condition imposed upon the legatee was a condition as to payment of money or a condition as to the release of claims, and in those cases it was held that where there was no gift over, so that there was no question of divesting an interest vested in such ultimate donee the mere time of payment or release was not of the essence of the condition, and accordingly that a subsequent release or a subsequent payment by the legatee might amount to a substantial compliance with the condition. But the principle on which the cases were decided was not limited to the payment of money or a release of claims. That appears in *Hollinrake* v. *Lister*. (2) The learned judge there, while himself limiting the principle to cases, or using language which only extends the principle to cases, where there is a question of release or payment of money, quotes with approval the language

(1) 3 Atk. 364. (2) 1 Russ. 500, 508.

of Thurlow L.C. in *Taylor* v. *Popham*. (1) He says: "The distinction is recognised in *Taylor* v. *Popham* (1), a case which, in one respect, is stronger than the present; for there Taylor, the legatee, had not only omitted to execute the release within three months, as required by the will, but had absolutely refused to execute the release, and filed a bill to assert claims incompatible with it. Yet even there Lord Thurlow thought that Taylor was not bound by what he had done, or omitted to do, and that he was still at liberty to comply with the condition." It is to be noticed too that in Roper on Legacies, 4th ed., p. 767, the learned author, citing from Swinburne on Testaments and Wills (Part IV., s. vi., art. 10), a well-known book, refers to the example of non-compliance with a condition, not as to paying money or to the release from debts, but with regard to the erection of a monument within a very short time after the testator's death. But the really important thing is, that the language of the Lord Chancellor in *Taylor* v. *Popham* (1) is clearly not limited to cases as to release from debts or payment of money, but applies generally to the performance of a condition precedent outside the time mentioned in the will but under such circumstances that the parties can be placed in substantially the same position as if the terms of the will had been strictly complied with.

It seems to me that there is nothing to show that the direction that the settlement should be executed within twelve months is more than a directory provision. It is not of the essence or the substance of the condition; and it is quite clear that all the parties interested can be placed in precisely the same position as if the condition had been literally and accurately complied with, because the funds, which ought to have been settled within twelve months of the death of the testator, have throughout been treated as if they had been so settled, and they can be now settled in the way required, so that there will be a continuous settlement of the funds as from the death of the testator.

In my judgment, therefore, the case is one in which there

(1) 1 Bro. C. C. 168.

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has been—I will not say no forfeiture but—no necessary failure to obtain the benefit of these two legacies, the legacy and the share of residue, given by the will. If Mrs. Waters executes a settlement as directed by the will—probably it would be a supplementary settlement to make good the ineffective partial settlement made in 1905—she will, on that settlement being executed, have complied substantially with the conditions imposed by the will, and will be entitled to have the funds in question applied in accordance with the will.

Solicitors for all parties : *Broad & Son.*

F. E.

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